Manor West, Inc. *and* Sandra Cullinan. Case 8–CA–24132

May 28, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

On October 23, 1992, Administrative Law Judge Joel A. Harmatz issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[1] findings,[2] and conclusions as modified and to adopt the recommended Order as modified.[3]

The judge found, inter alia, that the Respondent violated Section 8(a)(1) of the Act when Director of Nursing Sue Helterbran interrogated employee John Bishop on June 13, 1991. The Respondent excepts to this finding on the grounds that the judge failed to consider the totality of the circumstances of the alleged interrogation, and failed to balance properly the factors enunciated in *Rossmore House*[4] for determining whether an interrogation violates the Act. Based on our review of the evidence, as summarized below, we agree with the Respondent that Helterbran's questioning of Bishop did not have a reasonable tendency to interfere with, restrain, and coerce Bishop in the exercise of his rights guaranteed by Section 7 of the Act.

LPN Bishop went to Helterbran's office to discuss an incident that occurred the previous night. During the course of the discussion, Helterbran stated that there ''had been several problems popping up in the facility with the staff and she was wondering if [Bishop] could shed any light on the general situation in the facility.'' Bishop replied that he thought morale was at a very low point and that ''things were so bad that the people were talking of starting a union.'' He also reported that he had been approached by LPN Sandra Cullinan about starting a union. Helterbran then asked Bishop how he felt about a union. Bishop replied that it had its good and bad points, and that it could be beneficial.

At the time of the discussion, the Respondent had not engaged in any unlawful conduct, and it appears that the Respondent had no prior knowledge of the employees' union activities. Bishop initiated the conversation and volunteered the information about the Union. Further, Bishop seems to have answered Helterbran's question honestly, in an exchange that was otherwise free of threats, promises, or other coercive activity. Under these circumstances, we do not find Helterbran's questioning to be coercive, and therefore reverse the judge's conclusion that the Respondent interrogated Bishop in violation of Section 8(a)(1). See *Rossmore House*, supra.[5]

[1] The Respondent moved that the judge disqualify himself from the instant proceeding on the grounds that the record reflected statements by him which demonstrated hostility, bias, and prejudice toward the Respondent. The judge denied the Respondent's motion because he found that it was nonmeritorious and untimely filed. We have carefully reviewed the record and we agree with the judge that the motion to disqualify is without merit. We find, however, that the motion was timely filed. Sec. 102.37 of the Board's Rules and Regulations states that a party may request that a judge withdraw from the proceeding at any time before the judge files his or her decision by filing with the judge ''with due diligence'' and ''promptly upon the discovery of the alleged facts'' an affidavit setting forth the grounds for disqualification. The hearing in this matter closed on June 23, 1992, the Respondent filed its motion to disqualify on August 14, 1992, and the judge issued his decision on October 23, 1992. Because the motion was filed only 7 weeks after the close of the hearing and prior to the issuance of the judge's decision, we cannot conclude that the Respondent did not exercise due diligence and promptness in filing the motion.

The Respondent also moves to strike ''Appendix B'' of the judge's decision on the grounds that it constitutes an unwarranted attack on the Respondent's counsel. App. B contains the judge's specific findings on each of the Respondent's allegations of bias. Because the judge relied on these findings in ruling on the motion to disqualify, we find that the inclusion of App. B is necessary for a complete record and therefore deny the Respondent's motion to strike.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In sec. III,B, par. 3 of his decision, the judge stated that the LPNs met with Administrator Suzanne Poppelreuter on June 3, when in fact they met with Director of Nursing Sue Helterbran; in sec. III,C,2,c,(1), par. 7, the judge stated that an LPN in-training session was conducted on February 5, 1991, when in fact it was conducted on February 5, 1990; and in sec. III,C,2,c,(1), par. 8, the judge cited an incorrect date for *Passavant Health Center*, 284 NLRB 887, 889 (1987). These inadvertent errors do not affect the outcome of the case.

[3] We shall modify the judge's recommended Order to reflect our reversal of his unlawful interrogation finding and to conform the reinstatement language to that traditionally used by the Board. We shall also issue a new notice to employees.

[4] *Rossmore House*, 269 NLRB 1176 (1984), enfd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985).

[5] Contrary to his colleagues, Member Devaney would find Helterbran's questioning of Bishop violated Sec. 8(a)(1) of the Act. In this regard, Member Devaney points out that the conversation took place with the director of nursing, in her office, and at a time when Bishop had not yet disclosed his support for unionization. Member Devaney further notes that, although Bishop was the first to refer to the employees' union activities, Helterbran initiated this

Continued

AMENDED CONCLUSIONS OF LAW

Substitute the following for Conclusion of Law 3.

''3. The Respondent violated Section 8(a)(1) of the Act by informing an employee that his job was in jeopardy because of his suspected involvement in activity protected by Section 7 of the Act.''

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Manor West, Inc., Austintown, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Delete paragraph 1(a) and reletter the subsequent paragraphs.

2. Substitute the following for paragraph 2(a).

''(a) Offer Sandra Cullinan immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed, and make her whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of the decision.''

3. Substitute the attached notice for that of the administrative law judge.

APPENDIX C

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten you with discharge because of suspected or actual participation in activity protected by Section 7 of the Act.

WE WILL NOT discourage membership in a labor organization or participation in concerted activity for mutual aid and protection by discharging or in any other manner discriminating against you with respect to wages, hours, or other terms and conditions of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Sandra Cullinan immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed and WE WILL make her whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest.

WE WILL remove from our files, delete, and expunge any and all reference to the unlawful termination of Sandra Cullinan, and notify her in writing that we have done so, and that her termination will not be used against her in the future.

MANOR WEST, INC.

topic by asking Bishop whether he could ''shed any light'' on the problems ''popping up'' in the facility, and that Helterbran specifically asked Bishop how he felt about a union. In these circumstances, Member Devaney would find that the questioning of Bishop reasonably tended to be coercive and was unlawful.

Nancy Butler, Esq., for the General Counsel.
David H. Shaffer and *Gayle M. Montalto, Esqs. (Joondeph & Shaffer)*, of Akron, Ohio, for the Respondent.
Staughton Lynd, Esq., of Youngstown, Ohio, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JOEL A. HARMATZ, Administrative Law Judge. This case was tried in Youngstown, Ohio, on June 22 and 23, 1992, on an original unfair labor practice charge filed on November 27, 1991, and a complaint issued on January 27, 1992, alleging that the Respondent, Manor West, Inc.,[1] independently violated Section 8(a)(1) of the Act by coercively interrogating and threatening an employee concerning union activity and violated Section 8(a)(3) and (1) of the Act by on June 18, 1991, discharging its employee Sandra Cullinan.[2] In its duly filed answer, the Respondent denied that any unfair labor practices were committed.

After close of the hearing, the Respondent filed a motion to disqualify the administrative law judge pursuant to Section 102.37 of the Board's Rules and Regulations. The motion was accompanied by a supporting memorandum, together with affidavits signed by the Respondent's lead counsel, David H. Shaffer, who described his practice as ''limited to representation of employers in matters arising under the National Labor Relations Act,'' and a second affidavit executed by his associate, Gayle M. Montalto. These documents attribute bias and prejudice, or an appearance thereof, to me in the conduct of the hearing in the above-captioned matter.

[1] The name of the Respondent appears as amended at the hearing.
[2] The name of the Charging Party appears as corrected at the hearing.

A timely opposition was filed by counsel for the General Counsel, followed by a request on behalf of the Respondent for leave to file a reply, which is granted. For reasons stated infra, the motion for disqualification is denied as insubstantial. The merits of the issues in controversy were briefed by the General Counsel and the Respondent.

On the entire record,[3] including my opportunity directly to observe the witnesses and their demeanor, and after considering the posthearing briefs, I make the following[4]

FINDINGS OF FACT

I. JURISDICTION

The Respondent, an Ohio corporation, from its facility in Austintown, Ohio, is, and has been, engaged in the operation of a skilled long-term care nursing home and rehabilitation center. In the course of that operation, the Respondent annually derives gross revenues in excess of $100,000, and purchases and receives at the facility goods valued in excess of $5000 directly from outside the State of Ohio.

The complaint alleges, the answer admits, and I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges, the answer admits, and I find that District 1199, the Health Care and Social Services Union, SEIU, AFL–CIO (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Preliminary Statement*

This proceeding is essentially concerned with the discharge of Sandra Cullinan, a licensed practical nurse (LPN). The General Counsel contends that she was terminated in reprisal for union activity as well as conversations with coworkers pertaining to wages and conditions of work, including the possibility of a work stoppage in furtherance of employee interests. The Respondent defends essentially on grounds that Cullinan, as an LPN, was a supervisor within the meaning of the Act and hence was fair game for discharge. Alternatively, the Respondent denies that Cullinan was discharged in reprisal for any activity protected by the Act. The complaint also includes allegations that the Respondent independently violated Section 8(a)(1) of the Act when, as the General Counsel contends, another LPN, John Bishop, was interrogated and threatened concerning union activity.

B. *Interference, Restraint, and Coercion*

By way of background, it appears that employees at the Respondent's nursing home are not represented by a labor organization. Prior to the events in issue here, concern emerged among the LPNs regarding the level of wages and the amount of recent increases. In connection therewith, Suzanne Poppelreuter, the licensed administrator, of the home met with them in May 1991.[5]

About the second week of May, Sandy Cullinan, the alleged discriminatee, contacted the Union, primarily because of working conditions, including failure to abide by an alleged promise to furnish an adequate pay raise. It was Cullinan's position that this denial affected recruitment, thereby causing staff shortages, which raised concern for patient safety. In addition, a lack of air-conditioning, as promised made it extremely hot. Bishop was informed by Cullinan that she had contacted the Union.

On or about June 3, Poppelreuter again met with several LPNs. Cullinan acted as spokesperson for the latter, and presented Poppelreuter a list of concerns that she had prepared with input from other LPNs. Poppelreuter indicated that she would make an effort to provide a response.

Against this background, on June 13, Bishop, who had attended the meetings with Poppelreuter, called on Director of Nursing Helterbran. His purpose was to discuss an aide whose conduct precipitated an incident in his area the night before. As he reported the incident, Helterbran advised that

---

[3] After close of the hearing, pursuant to an agreement made in the course thereof, certain documents were received either by stipulation or consent. Accordingly, the record is reopened to receive R. Exhs. 28, 29, and 30(a) and (b). In addition, a motion by the Respondent to receive its additional Exhs. 23, 24, 25, 26, and 27 was denied in a ruling by me dated July 29, 1992, and these documents remain in a rejected exhibit file. In this regard, the record is reopened for receipt of:

ALJ Exh. 1(a) - Respondent's motion dated June 25, 1992.
ALJ Exh. 1(b) - A description of rebuttal exhibits.
ALJ Exh. 1(c) - Respondent's memorandum dated June 25.
ALJ Exh. 1(d) - Charging Party's response dated June 29.
ALJ Exh. 1(e) - General Counsel's reply dated July 7.
ALJ Exh. 1(f) - Respondent's letter to ALJ dated June 25.
ALJ Exh. 1(g) - ALJ's letter to Respondent dated July 6.
ALJ Exh. 1(h) - Respondent's cover letter and ''Reply Memorandum'' dated July 2.
ALJ Exh. 1(i) - Respondent's cover letter and ''Supplemental Memorandum'' of July 14.
ALJ Exh. 1(j) - ALJ's Ruling dated July 29.

Further, the record is also reopened to include the filings pertaining to the Respondent's motion to disqualify, as follows:

ALJ Exh. 2(a) - The Respondent's motion to disqualify.
ALJ Exh. 2(b) - Memorandum in support of motion to disqualify.
ALJ Exh. 2(c) - Supporting affidavit of David H. Shaffer.
ALJ Exh. 2(d) - Supporting affidavit of Gayle M. Montalto.
ALJ Exh. 2(e) - The General Counsel's opposition.
ALJ Exh. 2(f) - The Respondent's reply.

Finally, the Respondent's posthearing brief, like its various other filings in connection with this case, is replete with erroneous representations of fact which, considering their number and materiality, may not be lightly dismissed either as innocent mistake or fair argumentation. The brief is made part of the record as ALJ Exh. 3 as an aid to consideration of the reliability of characterizations made on behalf of the Respondent which are either subjective or not verifiable by the record. In addition, it is hoped that fully documented exposure of this proclivity will prove beneficial to any reviewing authority by encouraging a more credible and straightforward definition of what the evidence discloses than has been offered at this level.

[4] Following close of the hearing, the Respondent filed a motion to correct inadvertent errors in the official transcript of proceeding. To the extent consistent with my notes and recollection, for the most part, the errors cited and others have been corrected on ''APPENDIX A'' attached to this decision. [App. A has been omitted from publication.] However, certain changes have been spurned because they are not necessary to an understanding of the record.

[5] All dates refer to 1991 unless otherwise indicated.

there were several problems ''popping up in the facility with the staff,'' and inquired if Bishop ''could shed light on the situation.'' Bishop replied that morale was so low that people were talking about starting a union and that he had been approached by Cullinan in that regard. Helterbran then inquired as to Bishop's feelings about a union. Bishop replied that it had good and bad points and might be beneficial. The General Counsel contends that the Respondent violated Section 8(a)(1) through Helterbran's inquiry concerning Bishop's union sentiment. The uninvited questioning of an employee concerning union sentiment, at least facially, is coercive, where waged, as here, by a high-ranking functionary at a locus of managerial authority, and where addressed to an employee who had not previously disclosed his or her interest or proclivities. On this record, I would find that the Respondent thereby violated Section 8(a)(1)[6] should it be concluded that Bishop is an employee entitled to the protection of Section 7 of the Act.

Cullinan was discharged on June 18. Later that day, Bishop, at or about 4 p.m., was summoned to Helterbran's office. The latter opened the conversation by advising Bishop that Cullinan had been terminated. Bishop indicated that he had learned of the discharge. Helterbran stated that Bishop's name was ''also brought up in the incident with Sandy [Cullinan],'' adding that there were several complaints about Bishop's ''bad attitude.'' She further explained that if the complaint had been made by only one person, it would be dismissed as a ''personality conflict,'' but because there were ''several complaints,'' she believed there was substance to them, and should they continue, Bishop ''also'' would be terminated. Bishop replied that his ''attitude'' had never been questioned before, and he asked if Helterbran could be more specific. She replied that she had nothing specific. Bishop testified, without contradiction, that he had never been warned, verbally or in writing, concerning his attitude.

The General Counsel contends that Helterbran thereby threatened Bishop in violation of Section 8(a)(1). On the face of his uncontradicted testimony it seems evident that he was called to Helterbran's office to be informed that his job was in jeopardy. In doing so, Helterbran made vague references to an undefined, unprecedented, ''attitude problem'' which would not disassociate the threat of discharge from the fact that she had implicated him in an ''incident'' with Cullinan who had just been discharged. As shall be seen below, there is no evidence that Cullinan engaged in any conduct other than that which fell within Section 7 of the Act. In these circumstances, and as it is found below that the latter was discharged on statutorally proscribed grounds, it follows that unless the LPNs are supervisors, the Respondent violated Section 8(a)(1) in this respect as well.

C. *The Discharge*

1. The motivation

Cullinan was hired on October 5, 1988, by the Respondent's predecessor, Sleigh Bell Nursing Home (Sleigh Bell). She was discharged by the Respondent on June 18, 1991. Throughout her tenure, she worked as an LPN. Although customarily assigned to the evening shift, when discharged, Cullinan was working the day turn. Apart from the fact that she had previously contacted the Union, and the Respondent knew it, Cullinan that day, at or about 1 p.m., while still on her break, went to the lunchroom to have a coke. Several aides and members of the dietary and housekeeping staff were present, expressing outrage because they were bypassed when a related facility supposedly had received a 75-cent hourly increase. They discussed among themselves what they might do about it, and solicited Cullinan's opinion as to the propriety of a walkout. She replied that she thought that ''a walkout would get somebody's attention, but [she] did not think it would be effective at that point in time.'' Cullinan advised that they would be better off organizing a union, and that ''a potential walkout down the road would be possible if the company did not negotiate.''

Cullinan then left to return to her station, but first stopped at station 1 where she ran into Helterbran. Cullinan asked Helterbran if anything had been done about a list of grievances presented on behalf of the LPNs at the June 3 meeting with Poppelreuter. Helterbran responded: ''Sandy, Sandy, Sandy, what am I going to do with you?'' Cullinan then returned to her station. About 5 or 10 minutes later, she was summoned to Helterbran's office, where she was told that she was discharged ''immediately.'' Cullinan asked why, whereupon Helterbran stated that she had ''just heard a rumor that [Cullinan] . . . had approached two employees to walk out.'' Helterbran, on request of Cullinan, refused to disclose the source of the ''rumor.'' Helterbran then escorted Cullinan as she picked up her belongings and then to the door of the facility. Cullinan was denied an opportunity to speak either with the owner or the administrator of the facility.

Helterbran testified that on June 18, two aides reported that Cullinan ''was trying to get everyone to walk out.'' Helterbran, in turn, between 12:30 and 1 p.m., relayed the report to Suzanne Poppelreuter, the chief management functionary at the facility. The latter instructed Helterbran to terminate Cullinan.[7]

Poppelreuter confirms that she made the decision to terminate Cullinan immediately on being informed by Helterbran that the latter ''was trying to get the nursing assistants to walk out.''[8] There was no attempt on her part to seek out Cullinan's version of what might have occurred. She provides no other explanation for the cause of the discharge.

---

[6] See, e.g., *Rossmore House*, 269 NLRB 1176 (1984), enfd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985).

[7] Helterbran testified that her information from the aides was confirmed *after her conversation with Poppelreuter*, when Cullinan approached her stating, ''You're very lucky . . . . we were all going to leave.''

[8] See, e.g., General Counsel's Exhibit 9(c) (GCX–9(c)). Cullinan was the only witness to the lunchroom conversation which triggered her discharge. Her uncontested account fell easily within the protective mantle of Sec. 7 of the Act. Poppelreuter's own testimony demonstrates that Cullinan was discharged on the basis of the Respondent's understanding, gleaned solely from a report, as to what had transpired in the lunchroom. The latter's own description of the basis for her action reflects that she acted on a proscribed motivation, for, in the health care industry, an invitation to engage in a work stoppage falls within the protective mantle of Sec. 7. See, e.g., *Keyway*, 263 NLRB 1168 (1982). Thus, the General Counsel has demonstrated, virtually to the point of admission, that this discharge was founded on considerations inimical to statutory guarantees.

By way of posthearing brief, counsel for the Respondent states that Cullinan was discharged because of ''her perceived disloyalty to the Employer.'' The assertion is specious. Neither Poppelreuter nor Helterbran was examined by the Respondent as to any justification for the discharge, and the record contains nothing which would lend substance to this naked claim. Hence, based on Cullinan's credited testimony, which is the only evidence of what occurred during the critical lunchtime conversation,[9] it is concluded that, unless Cullinan is found to have been a statutory supervisor, her discharge violated Section 8(a)(1) of the Act.

The General Counsel has also substantiated, prima facie, that Cullinan was terminated in reprisal for union activity, thus violating Section 8(a)(3) and (1) of the Act as well. Uncontradicted evidence establishes that earlier, in the month of her discharge, Cullinan had contacted the Union. Bishop, in his June 13 conversation with Helterbran, informed the latter that Cullinan had approached him concerning a union. Union animus and the fact that any organization campaign had been thwarted by the discharge of Cullinan were linked by Poppelreuter, who after the discharge, stated in an internal memo:

> I honestly don't feel with Ms. Cullinan gone there is potential for a union here. I'm a little high strung when I hear the word union. [GCX–9(c).]

The foregoing warrants an inference that union activity was at least ''a'' motive for the termination. Against this background, the Respondent elected to refrain from presenting a scintilla tending to demonstrate that the termination would have occurred even in the absence of union activity.[10] Here again the Respondent appears to prefer argument to evidence. In its posthearing brief, it is argued that union activity could not have been a motivating factor because a document subsequently prepared by Poppelreuter indicates that organization was unknown to her at the time of discharge. Here, the Respondent seeks to gain comfort from a document, which not only did it decline to offer, but also was received over its objection on grounds of relevance. (GCX–9(c).) In any event, the document is unsworn and Poppelreuter was not examined as to the accuracy of its content. Poppelreuter was available, but not examined as to what she knew about Cullinan's union proclivity at the time of discharge. Here again, the Respondent failed to adduce evidence in substantiation of its position and has allowed the record to stand without probative evidence as to just when Poppelreuter learned of Cullinan's involvement. Hence, apart from the supervisory issue, the discharge also violated Section 8(a)(3) and (1) of the Act.

[9] Even if competent evidence showed that the Respondent acted on ''a good faith belief'' that misconduct was involved, it acted at its peril in discharging Cullinan on that assumption. For if, as is the case here, Cullinan's actual behavior reflected nothing that would remove statutory guarantees, the Respondent's good-faith belief would be insubstantial. *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964).

[10] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

2. The supervisory issue

a. *Preliminary statement*

As indicated, Suzanne Poppelreuter is responsible for overall operations at the home, a 98-bed facility. A number of ''department'' heads report directly to her, including housekeeping, quality assurance, infection control, food service, staff development, accounting, maintenance, and nursing. Of concern here is the nursing department headed by Helterbran, the director of nursing. Within her jurisdiction are RNs, charge nurses,[11] and LPNs. The LPNs report to the RNs, who, at times material were called ''nursing supervisors.'' The LPNs, in turn, oversee, but join aides and orderlies in providing hands-on, patient care.

Poppelreuter became administrator after the Respondent's acquisition of the facility in May 1990. The LPNs' authority under Sleigh Bell, the predecessor, at least inferentially, would have been greater. Sleigh Bell was licensed as a an ''intermediate care facility.'' As such, it was required to retain an RN only on the daylight shift. Thus, LPNs were the sole arm of management at the facility during major portions of the workweek.

The Respondent, however, was licensed at a higher level of care, being a ''skilled nursing facility,'' a classification that allowed housing for Medicare patients, but was subject to more stringent requirements, including round-the-clock, 7-day manning by an RN. Thus, after the Respondent acceded to ownership of the facility and hired the requisite complement of RNs, the LPNs seldom were the sole representatives of management available in the home. On those limited occasions, an RN was always on call. Although proportionate staffing in the area of nursing care is not defined precisely on this record, it is suggested that 11 aides worked the daylight shift. Beyond that the only other testimony on the point was testimony by Helterbran that on the afternoon shift, an RN would ''supervise'' LPNs and seven to nine aides in the entire home.

b. *The appellation*

At the threshold is a question as to whether LPNs, prior to the Cullinan discharge, had been referred to within the Respondent's operation as ''supervisors.'' A form of this term was in use at both Sleigh Bell and the Respondent, but the usage did not suggest that LPNs had been awarded that title.

For example, on February 5, 1990, Sleigh Bell conducted a periodic ''in-service training'' meeting. It was attended solely by RNs and LPNs. The session was governed by a documented agenda that expressly declared that the aides were subject to the ''supervision'' of those attending.[12] Earlier, on July 16, 1987, a few months prior to Cullinan's hire, LPNs were counseled as to their role as an ''immediate su-

[11] The Respondent employees three charge nurses. This position is occupied by an LPN who receives a 50-cent hourly premium and performs extensive paperwork. Cullinan never served in that capacity.

[12] Respondent's Exhibit 2 (R. Exh. 2 or RX–2). Cullinan denied that the signature appearing on the attached roll was hers, and she could not recall ever attending a meeting in which it was explained that the aides were under supervision of the LPNs.

pervisor of nurses aides . . . [and] to some extent housekeeping personnel.'' (RX–11.)

The General Counsel's principal witnesses on the supervisory issue were Cullinan, John Bishop, and Kathleen Best. Bishop remains in the Respondent's employ as an LPN. Best occupied that position until her employment ended on August 27, 1990. All three denied being informed that they were supervisors.[13]

Consistent therewith, documentary evidence shows that after the Respondent took over in May 1990, the expanded corp of RNs and others at higher levels—but, not the LPNs—were called supervisors. Thus, on March 7, 1991, such a session was conducted for ''all nurses and nursing supervisors'' at which the disciplinary system was explained. RX–1(a). The meeting was attended by LPNs and RNs. RX–1(b). Helterbran testified that the RNs were the referenced ''nursing supervisors.'' It follows, that the appellation, ''nurses'' on that announcement embraced the LPNs.[14] This conforms with several of the Respondent's working papers. Thus, on the monthly schedule affecting RNs and LPNs, only the former are identified with ''SUP,'' which Helterbran described as an abbreviation for supervisor. (GCX–5.) In addition, the job description issued by the Respondent for the ''staff nurse'' does not state that those covered are supervisors. (RX–13.) Instead, that document requires that they ''Assist supervisors in care and management of the unit. . . . and [c]arry . . . out instructions of Supervisors.'' Although Helterbran testified that the reference was to LPNs and not RNs, this construction seemed illogical on the face of the document and in light of other objective proof as to just who held the title of ''supervisor.'' The job description, which apparently had not been circulated to those affected, does use the term ''supervise'' to characterize a sector of the responsibility of the staff nurse, and, thus, again uses the term in the functional sense, without stating that the LPNs were called supervisors.[15] Finally, it is noteworthy that after Cullinan's discharge, among the changes affecting the status of the LPNs was a new title. Thus, consistent with Bishop's undenied testimony, the term ''nursing supervisors'' was bestowed on them and removed from the RNs, who were given the title, ''nursing coordinator.''

In any event, the question is somewhat beside the point. For, it is the authority, rather than title assigned by the employer, that is determinative.[16] Thus, the Respondent, in order to prevail, is required to demonstrate by a preponderance of the evidence, that Cullinan, actually possessed the authority specified in Section 2(11) of the Act. *Ohio Masonic Home*, 295 NLRB 390, 393 (1989). It is instructive, however, that after Cullinan's discharge, the Respondent seized on the opportunity to bestow the title on the LPNs.

c. *Discipline*

(1) The duty to monitor and report

Cullinan denied that she had a role, either as a participant or consultant, in determining whether aides or orderlies should be disciplined, or to what degree. Nevertheless, she and other LPNs were expected to and, on a regular basis, did in fact monitor, correct, and report failures in the performance of hourly personnel, particularly, the nurses aides. However, beyond the role of documentation, it is not so clear that the LPNs have any role in disciplinary enforcement, directly or through recommendation, either their own directives, accepted standards of patient care, or the Respondent's policies and practices.

Basically, the LPN would monitor and report on a variety of matters affecting patient care. Every incident of significance would be memorialized by the LPN in a ''situation report.'' This document included a description of the infraction and the nature of corrective action taken by the LPN.[17] The completed forms were submitted to the office of the director of nursing, where they were filed and maintained.[18] As might be expected, it would not be unusual for a superior to take followup action with the LPN involved to clarify or develop further information with respect to data contained on his or her ''situation report.''

In addition to the ''situation report,'' LPNs were encouraged to prepare forms called ''employee problem area.'' These documents also described incidents where employees engaged in a breakdown of their responsibilities. Occasionally, they would reflect that the LPN had taken steps to counsel or correct aides for poor work practices or deviation from routine health care norms. In one such document, under date of December 16, 1990, Cullinan iterates that she had oc-

[13] Bishop testified that after the discharge of Cullinan, the LPNs were told that we would be called ''supervisors.''

[14] Cullinan testified that to the best of her knowledge she did not attend a meeting where the topics mentioned on March 7 were discussed. She identified her signature on the separate list presented by the Respondent along with that document. RX–1(a). She could not agree, however, that that particular sign-in sheet actually related to the March 7 meeting. Although Bishop initially denied attending such a meeting, after shown the attendance sheet bearing his signature, he did recall that he attended a session where those present were informed of the grounds for immediate dismissal.

[15] The Respondent's ''Employment Handbook,'' p. 14, sets forth a report off procedure which requires the employee to report lateness in advance to his or her ''immediate supervisor or RN supervisor.'' GCX–7. There is no indication that this requirement is limited to the nursing department, and, accordingly, the term immediate supervisor as used there would not necessarily embrace the LPN.

[16] *NLRB v. Southern Bleachery & Print Works*, 257 F.2d 235, 239 (4th Cir. 1958). *Pine Manor Nursing Home*, 238 NLRB 1654 and cases cited at 1655 (1978). The issue of is not to be confused with the agency concept of apparent authority, whereby an employer would be bound by the conduct of those held out as empowered to speak in its behalf. The result would be the same under this doctrine whether the subordinate actually held such authority. Thus, the fact that LPNs and RNs wore common uniforms and attended meetings with management representatives might suggest to subordinates that they were part of supervision, but would not override the need for proof that Sec. 2(11) authority was actually held.

[17] For example, this process was used by Cullinan to report that she had directed an aide to clean up her work area. RX–3(c). On another, she recorded that she had to intervene, through investigation and identification of the aide responsible, where a patient that required feeding was not in fact fed. RX–3(d). She had also done so in connection with a family complaint that a resident's soiled garments had not been changed. At that time, Cullinan reported that the aide in question also had made an insolent remark in front of the relatives when alerted to their complaint. RX–3(e).

[18] This is based on the testimony of Helterbran. It does not appear, and it seems unlikely, that Helterbran would be the custodian of personnel files. There is no evidence that a duplicate is retained in the employee's personnel file.

casion to ''advise'' an aide ''to do things over and do them right.'' (RX–3(f).)

Moreover, apart from formal reports, the LPNs could maintain operational security by seeking direct intervention of an RN, who ordinarily would be present, but if not available at the facility, would be accessible as ''on call.''

The Respondent suggests that LPNs when employed by Sleigh Bell had authority to discipline and that this did not change when it assumed ownership and control of the facility.[19] It is conceivable that such authority existed at Sleigh Bell.[20] An LPN in-training agenda held by the latter on July 16, 1987, portends discussion pertaining to the appropriate use of oral and written warnings, thus, possibly implying that the LPNs in attendance had authority to effect such discipline. (RX–11.)

That this authority remained in place after May 1990 is not so clear. The Respondent asserts in its brief that, in the process of completing situation reports and problem area forms, the LPNs were expected ''to recommend further action if necessary.'' At least prior to the discharge, the record fails to afford a foundation for this representation. Not one witness testified that this was the case, nor does it appear that the LPNs were ever encouraged to make any such recommendations. Helterbran did testify generally that after the Respondent assumed control of the facility, there was no change in the authority or responsibility of the LPNs. The gap is not filled by this sweeping, highly argumentative observation.[21] Nor is anything concrete forthcoming from another of Respondent's witnesses Karlon Ware, an LPN, who presently serves as the Respondent's staff development coordinator. Ware agreed that, after the transition, the authority of the LPNs was ''basically the same.'' Yet, neither testified that LPNs were ''expected'' to make recommendations concerning discipline, nor did they suggest that at any time between May 1990 and Cullinan's discharge on June 17, 1991, LPNs were informed that they had authority to recommend or effect discipline in any conventional form.[22] Finally, the representation by the Respondent's counsel is far from confirmed by the vast documentation offered by the Respondent ostensibly to support its position. From this collection, it appears that during Cullinan's employment by the Respondent, not once did an LPN issue a recommendation on discipline, or, on his or her own, dispense a reprimand or other penalty cognizable under the established system of discipline.

Thus, whatever the situation at Sleigh Bell, the ''situation reports'' and ''problem area'' forms on their face are consistent with Cullinan's denials that the Respondent's LPNs had authority either to recommend or issue any form of discipline. Indeed, on February 5, 1991, an ''LPN in-training session'' was conducted by Helterbran and Poppelreuter on behalf of Manor West. The agenda sheet used on that occasion indicated that LPNs were informed that the aides were under their supervision. Yet, that document includes no suggestion that LPNs were empowered to issue warnings or discipline of any kind. Instead, their enforcement powers were evident solely through instruction that they use the ''situation reports'' and monitor the availability of the aides. (RX–2.) Also noteworthy is the fact that the job description for the ''staff nurse'' defines the occupant's role as providing ''leadership of the professional and non-professional staff.'' It fails, however, to entrust them with any authority to warn, reprimand, or otherwise discipline. (RX–13.) Finally, the Respondent introduced ''corrective action forms,'' documents that allotted space for LPNs and higher ranking functionaries to recommend suggested types of discipline, ranging from reprimand to discharge. These documents existed and were used by higher management prior to Cullinan's discharge. (RX–28.) However, consistent with the uncontradicted testimony of LPN Bishop, it was not until August 1991 that LPNs were authorized to issue them. (RX–18(a) through (nn).) At that time, these documents replaced the ''situation reports.'' This after-the-fact documentation stands as the sole evidence that LPNs employed by the Respondent ever, acting independently, ministered formal discipline.

On the foregoing, it is concluded that the enforcement role of the LPNs, except in the extreme cases considered below, and during the relevant time frame fell within the Board's admonition that ''mere factual reporting . . . that do[es] not affect job status or tenure do[es] not automatically constitute

[19] The term discipline as used in this section includes every conventional form of adverse action other than sending an employee home. Action of this latter type is treated separately below.

[20] Counsel for the Respondent cross-examined Cullinan at length concerning her authority during the Sleigh Bell era. He represented to me that through this tact, he would get Cullinan to admit that she was a supervisor at Sleigh Bell and that this did not change after Respondent's accession as operator. However, as matters turned out this combination would go unproven through the Respondent's own evidence. In any event, Cullinan conceded that at Sleigh Bell she served as ''the eyes and ears . . . on duty at the time,'' because an RN was present only occasionally. She insists, however, that she was not asked for a recommendation on discipline, and never provided one, but simply reported facts.

[21] This testimony is no more reliable than Helterbran's corresponding generality that RNs and LPNs are the ''same'' in that ''their jobs are no different, they're supervisory staff, they're in the same category as each other.'' This, if true, would have a material, if not dispositive impact on the result. For, the RNs, unquestionably, at all times possessed indicia of supervisory status set forth in Sec. 2(11) of the Act. However, the LPNs are by no means at the same level of authority. Thus, they are subordinate to the RNs. The RNs, but not the LPNs, prior to the Cullinan discharge, were called ''nursing supervisors.'' Their hourly earnings range to more than 25 percent higher than LPNs. GCX–6(a) and (b). More importantly, during the relevant time frame, the RNs, not the LPNs, on their own, decided on and disciplined the aides, scheduled the aides to their shift and section, and routinely assigned them to patients. Is it possible that counsel was unaware of these distinctions when this testimony was exacted from the director of nursing?

[22] Cullinan denied that during her tenure, a single representative of the Respondent ever asked for a recommendation as to whether or just what discipline should be invoked. This testimony was not denied. Helterbran did relate that, on an *infrequent* basis, she did ''query LPNs about recommendations for discipline.'' However, she appeared to stumble over the specifics of such requests, and, in any event, the conversations she describes suggest an off-hand inquiry as part of a running discussion concerning an aide's performance, rather than the type of direct request for a disciplinary recommendation that would lead one to believe that the LPN was a participant in any disciplinary process. Her testimony certainly does not suggest that she ever requested an LPN's opinion on discipline in connection with a specific report of misconduct provided by the latter. Moreover, her testimony in this area was plagued by prejudicially leading questions, and it was my impression that as to the material aspects of this testimony, Helterbran, when pressed for details, detoured to argumentation, rather than actual experience. Her testimony in this respect struck as unreliable and is rejected.

supervisory authority.'' *Ohio Masonic Home*, 295 NLRB 390, 394 (1989).[23] Accordingly, the ''situation reports'' and ''employee problem forms'' simply ''bring to an employer's attention substandard performance by employees without recommendation for future discipline, and an admitted statutory supervisor . . . the director of nursing . . . makes an independent evaluation of the employee's job performance.'' ''[T]he role of those delivering the warnings is nothing more than a reporting function.'' *Passavant Health Center*, 284 NLRB 887, 889 (1984).

(2) Emergency suspension

At Sleigh Bell, the LPNs could send an unruly aide home. In this latter connection, Helterbran testified that from the outset of her employment by Sleigh Bell she was told that the LPN had the authority to clock out someone in the event of a problem, removing his or her timecard for placement under the door of the administrator.[24] She concedes, however, that it was invoked on an infrequent basis and was a measure to be used sparingly and only as a last resort.

Karlon Ware, an LPN called by the Respondent, who presently serves as its staff development coordinator, offered this as the sole example of discipline that she was informed that she could exercise as an LPN:

> Well, I remember them saying that we could do that. We could . . . clock someone out. We could pull their time card. We could send them home, you know, if we had to; if we let someone go, you know, not to worry about it because if it was a mistake, you know, they would correct it, you know, the next day.
>
> But, that if we felt that a patient was not getting the proper care, was in danger or even the staff member that it was our responsibility to do this, you know, to send that person home, to clock that person out.

Ware concedes that she never had occasion to take this step.

Consistent with the mutually corroborative testimony of Ware and Helterbran, Cullinan's prehearing affidavit states, ''Before the institution of the R.N. supervisor position, L.P.N.'s could clock aides out for misconduct.'' Cullinan attempted to qualify this statement, narrowing it to situations where such action was directed by a superior. However, the sworn prehearing affidavit describes the authority in the broadest of terms, and in this respect, I am convinced that LPNs in extreme circumstances were authorized by Sleigh Bell to send an employee home.

The question is whether the LPNs could act independently in this area after May 1990. Cullinan and Bishop denied that such authority had been conferred by the Respondent. However, both had previously threatened to take this step against recalcitrant aides. In December 1990, Cullinan authored a ''situation report'' in which she recorded that she told an aide:

> [T]o stop arguing and just do her job or she could clock out and go home. [RX–3(a).][25]

Most significant, however, was testimony by John Bishop. The latter had never worked for Sleigh Bell, but was hired by Manor West in September 1990. He testified to a pair of incidents where he threatened to clock out an aide. The first involved an aide who was told that she would be sent home if she did not stop watching TV to neglect of patient care. The second case was documented in memorandum dated June 4, 1991. It involved an identical threat to an unruly aide. (RX–6(a).)[26]

Nevertheless, Helterbran and Ware described this as a last resort to be invoked only in extreme cases. Indeed, it was so rarely invoked that not one of the LPNs that testified stated that they ever had occasion to do so, except on direction by an RN.[27] Moreover, the Respondent has not produced any evidence that this ever had occurred in any other context. Beyond that, necessity for the LPNs to invoke this measure independently would have been lessened as of December 1990, when the Respondent met its staffing requirement for round-the-clock, onsite presence of an RN. In these circumstances, it is concluded that this seldom, if ever, exercised authority is within the realm of ''extreme circumstances'' discounted by the Board ''as . . . insufficient by itself to establish supervisory status.'' *Phelps Community Medical Center*, 295 NLRB 486, 492 (1989); *Riverchase Health Center*, 304 NLRB 861 (1991); *Highland Superstores v. NLRB*, 927 F.2d 918 (6th Cir. 1991).

d. *Evaluation*

Cullinan denied that her opinion concerning an aide or orderly was ever solicited. This, however, was implicit in the Respondent's system of evaluating employees. Thus, although the LPNs had no access to personnel files of the aides or orderlies,[28] they contributed to the latter's periodic evaluations.

Under this system, it would be unusual for any one aide or orderly to be rated by just one LPN. Instead, the LPNs are required to prepare evaluations on each aide or orderly that they had opportunity to work with during the relevant period. The various ratings on each aide are then processed

[23] In *Ohio Masonic*, supra, it was assumed that the LPNs independently completed ''oral warning'' forms for placement in the employee's personnel file. Here, however, prior to the Cullinan discharge, the Respondent's LPNs completed no document which conveyed, as a matter of form, that an infraction or subject of counseling might be used against the employee in the future.

[24] Beyond that there was no indication that the LPNs had any further role in the imposition of discipline in such cases. Helterbran testified that the timecard procedure was designed to require the employee to report to the administrator on returning to work.

[25] This directive came in a second conversation with the particular aide. The ''situation report'' does not indicate what might have happened in the interim. The Respondent's posthearing brief states that in stating that the aide could ''clock out'' if she could not abide by the rules, ''Cullinen [sic] admitted that she exercised independent judgment and that she warned the nurse aide [sic] without consulting anyone.'' Cullinan was not examined on this point and her testimony is devoid of any such admission.

[26] Although Bishop would have me believe that he would take this step only after consulting with an RN, it was my distinct impression that the threats were made spontaneously as the incident unfolded without opportunity to seek views of a superior.

[27] Kathleen Best testified that she clocked out aides in consequence of two incidents. She insists, however, without contradiction, that each was authorized directly by a superior, who did not solicit Best's opinion as to how or whether the individual should be disciplined.

[28] Best and Cullinan testified to this effect without contradiction.

by the staff development coordinator, who averages the scoring, and prepares a ''summary sheet.'' The original LPN evaluations then are destroyed. The director of nursing will discuss the ratings with the aide, without participation of any LPN. There is no evidence that the evaluations impact on opportunities for wage increases, retention, or promotion, or other condition of a nurses aide's performance.[29]

In its posthearing brief, counsel for the Respondent states that ''informal commendations are given to the nurses aides by LPNs.'' Documentation confirms that this was the case, but that the practice did not make its mark until after the discharge of Cullinan. Thus, it appears that, prior to June 18, an LPN had taken this step on a single occasion, and at that through a notation dated August 11, 1988, well prior to the Respondent's acquisition of the facility. RX–30(a). This single isolated expression contrasted with the 15 written commendations or ''atta boys'' proffered by the Respondent at the hearing, all of which postdated the discharge.[30] At least 3 years had lapsed between the earliest of the ''atta boys'' and Respondent's Exhibit 30(a). It is fair to infer that in the interim this practice had fallen into disuse. Considering the hiatus, it is difficult to accept that any formal steps were taken to by the Respondent prior to the discharge to encourage LPNs to submit commendations.

''The authority simply to evaluate employees without more is insufficient to establish supervisory status.'' *Passavant Health Center*, 284 NLRB 887, 891 (1987). This factor has been deemed unpersuasive in the absence of evidence that ''a nurses' aide's job was ever affected by an LPN's evaluation.'' See *Riverchase Health Center*, supra, 304 NLRB at 861. Here, there is no persuasive evidence that the evaluations submitted by the LPNs, or for that matter, any complimentary memos, contributed in any sense to personnel decisions or actions[31] with respect to aides or orderlies.[32] It is concluded that the LPNs' role in connection with periodic evaluations and ''atta boys'' therefore fail to substantiate the claim of supervisory status. *Phelps Community*, supra, 295 NLRB 486, 490; *Waverly-Cedar Falls Health Care*, 297 NLRB 390, 391 (1989), enfd. 933 F.2d 626 (8th Cir. 1991).

e. *Direction*

Cullinan described her duties as primarily to pass out medications,[33] to provide treatments, and to do charting. The evidence does not disclose the staffing ratios on the afternoon shift normally worked by Cullinan. The day turn typically would be staffed by 11 aides and 3 to 4 LPNs. The aides would be immediately responsible to the LPNs, not the RNs. There is no question Cullinan and other LPNs are responsible ''for overseeing the care provided by the aides.''

Cullinan would be assisted by three to four aides. She describes her interaction with the aides as solely to assure that patient care was carried out. For example, if she saw a resident in need, she would tell the aide assigned to that room to take care of the problem or request the latter's assistance in completing the task herself. She would take the initiative in assisting such a patient, and would record what had been done, but made no written recommendations as to future action appropriate for the health or well being of a patient. Patients under her care would be attended by several others that had shiftwide responsibility, namely, a bath aide, med tech, and two rehabilitation aides. Helterbran testified that, if these latter individuals had any questions, they would address them to the LPN in the area. As part of the patient care process, the LPN would listen to complaints by family members and relay them to whoever might be responsible.

The Respondent appears to contend that the role of LPNs in several areas demonstrates that they exercise independent judgment in directing aides. First, is the claim that they initiate ''daily staffing and adjustments.'' In terms of scheduling, LPNs have no input into advance assignment or the planning of manpower utilization. Instead, this is performed entirely by an RN, through preparation of a monthly schedule. Pursu-

[29] Contrary to the Respondent, the Board's decision in *Ohio Masonic Home*, 295 NLRB 390 (1989), is not distinguishable on grounds that the LPNs in that case ''did not recommend that action be taken on evaluations.'' During the relevant time frame, the same was true here. As in that case, the evaluation system included no ''recommendations regarding promotions, wage increases, discipline, or retention.'' In other words, here, as well, the Respondent has failed to demonstrate by credible proof that the evaluations impacted on the rated employee's job status.

[30] RX–20(a) through (o). At the hearing, the Respondent produced numerous ''corrective action'' forms and ''atta boys.'' Not one predated the Cullinan discharge. Helterbran attributed the absence of earlier documents to the fact that the search was limited to the files of incumbent employees. Considering the materiality of these documents, one would think that these documents would have been the subject of an aggressive, comprehensive search. In any event, at my direction, the parties agreed to a posthearing examination of the personnel files of former employees to ferret out any such documents that would have predated the discharge. Apparently, nothing was found other than the single ''atta boy'' noted above.

[31] The Respondent states in its brief that ''Karlon Ware testified that the nurses aides [sic] job status was often affected by recommendation from LPNs, both formal and informal.'' Having studied the cited sector of the record, as well as the entirety of Ware's testimony, I find no support for any such statement. In fact, when Ware was asked by the Respondent's counsel whether she was ever told that management would take action because of any recommendation on her part, Ware replied:

> Gee, I don't think I had it like any formal, no.

[32] In its posthearing brief, the Respondent states that Karlon Ware ''corroborated'' that this was ''a long standing practice.'' In fact, Ware stated that she was unaware of how long any such practice had been in effect. Moreover, as I understand her testimony, it was her ''personal'' practice to pass on a written commendation for a job well done. I also did not believe Helterbran to the extent that she suggests that complementary memos were used, prior to the discharge, to choose between aides in the event of a cutback in hours. The fact that only one issued by an LPN could be exacted in this entire period makes it unlikely that personnel files were canvassed for such documents in furtherance of such personnel action during that time frame, or that ''atta boys'' signed only by LPNs then were part of an entrenched system of reward.

[33] Each station has a medication cart which contains all medications, including narcotics, for patients in the area. The LPNs are entrusted with the key to a medication cart, to which only they have access. The LPN is also authorized to obtain the key to a medical storage room in order to replenish medical supplies of a type that do not require prescription. Medications, however, are subject to ''reorder'' when they near completion through an automatic tag procedure enabling the LPN to complete the process by contacting the pharmacy in a separate building. Once delivered, the LPN would inventory the medication as received and then place it in the medication cart.

ant thereto, aides are assigned to a particular shift, a particular area, and a particular cluster of patients. Adjustments in assignments are made only where a previously scheduled aide reports off, thus, creating an unanticipated deficiency in manning. In such a case, the LPNs would first attempt to fill the void either by themselves drawing on a list of aides maintained at the stations, or by requesting an RN to solicit a replacement by telephoning someone off duty.[34]

Counsel for the Respondent states that the LPNs ''authorize'' and ''approve'' overtime. However, overtime is only one means of filling by an unexpected vacancy and is dictated entirely by that eventuality. Helterbran was aware of no other situation in which an LPN could take steps producing overtime. On those occasions, in addition to soliciting the unscheduled aides, the LPNs, on their own, will attempt to correct the shortage by soliciting an on-duty aide to work an extended shift. Should a volunteer emerge, overtime would inevitably result. However, this effort by the LPNs is dictated by the unmistakable, rather than anything requiring interpretation or judgment. In these circumstances, the LPNs are not viewed as ''authorizing'' or ''approving'' overtime in any discretionary sense. They do sign overtime slips to attest to the fact that the overtime hours were actually worked. In doing so, they are simply supporting a recordkeeping function, while acting as witness to the event, an act that does not entail independent judgment or supervisory authority.[35]

If no volunteer could be found, the nursing unit would work short-handed, but only after balancing off the assignments according to a scaledown formula. The latter is an equation which defines the ratio per unit and alternative assignments based on the number of aides available. It too is supplied by higher management to assist LPNs in this process.[36] The LPNs decide how the slot will be filled. Often, they would not act alone, but confer with other LPNs in order that the choice be fair to the affected aides, yet provide adequate coverage. For example, Bishop explained that the RN lists the aides on her schedule by patient rooms. He would resolve a shortage by taking the last listed aided and slotting that individual into the vacancy. He relates that others might use an alternative method, rotating each aide up one station. In each instance the determination would appear to be based on two considerations, balanced coverage and assurance that the same aides are not burdened each time there is a shortage.[37] In any event, there is no perceptible basis for concluding that the LPNs exercise independent judgment of a responsible nature in this process. The Respondent, though arguing that this is the case, does not explain where or how this would be so. There is no indication that replacements were contacted according to any subjective preference, such as ability and fitness, rather than at random. The evidence shows that changes to schedule are made only to cover unexpected absenteeism, and that LPNs have no discretion to alter assignments to accommodate any other concern. In the circumstances, this isolated intrusion on a predetermined schedule strikes as a ministerial, nonjudgmental matter. See *Riverchase Health Center*, supra.

Beyond that, the Respondent points to a document defining the steps to be taken by an LPN in the event of fire, tornado, and other emergency situations. (RX–16.) It is argued that: ''The plans are replete with duties which require LPNs to exercise independent judgment.'' As I stated at the hearing, this document, down to the finest detail lays out a step-by-step procedure to be followed. Nowhere does it state that any aspect of the plan is committed to the personal judgment and discretion of the nurse.[38] The Respondent states that, this very interpretation was made on the record even though I had not read the document. The charge is facially curious. If I had not examined it, the hunch was pretty accurate. Even more mystifying is the observation in the Respondent's brief: ''Now that the Administrative Law Judge has had the opportunity to read the document, he will presumably concede that his first impression was erroneous.'' There is no need for concession. Having read and reread this document, my initial reaction stands firm; namely, that it, for very good reason, is designed to minimize discretion or independent judgment in the delicate process of securing patients in the event of a life-threatening emergency.[39]

The Respondent adduced a quantum of evidence, apparently as indicative of LPNs' accommodation of those who

[34] There apparently is no firm practice in this respect. Cullinan testified that she made the phone calls herself and also requested that the RN do so. Bishop testified that he simply informed the RN of the shortage and she made the phone calls. Best testified that, in addition to herself, sometimes if the LPNs were busy, the aides themselves would call people they knew in an effort to alleviate the shortage.

[35] The Respondent would distinguish *Ohio Masonic Home*, supra, and *Pine Manor Nursing Home*, 238 NLRB 1654 (1978), on grounds that the LPNs in those cases lacked authority to call in a substitute employee or to request that an aide work overtime. This is a distinction without material difference. For, as indicated, in this case, the aide could not be compelled to work, and the calls were made in accord with a predetermined scheme, thus, amounting to a nonjudgmental, perfunctory task dictated solely by an unanticipated absence.

[36] Although the evidence is far from crystal clear in this respect, the above is based on my understanding of testimony provided by Cullinan, Bishop, and Best.

[37] Apparently, as part of the effort to establish the quality of discretion used by the LPNs in this process, the Respondent produced a ''situation report,'' dated October 14, 1990, which bore the signature of N. Raines, an LPN. RX–21. Raines was still employed at the time of the hearing, but not called as a witness. The document as a business record does not on its face establish that Raines acted alone in effecting her solution. Indeed, the fact that she referred to revisions in future schedules and different areas gives rise to the possibility that others might have been consulted. Although the document was identified by Helterbran, no foundation was laid establishing that she had firsthand knowledge of all aspects of the incident or its background. Only Raines was in a position to afford primary evidence as to just what occurred.

[38] Counsel for the Respondent disagrees vehemently with this observation. He argues that the printed fire plan requires that the LPN determine the order of evacuation. On the contrary, item 3 sets forth the geographic sequence for evacuation. See also p. 5. Counsel for the Respondent also reads this document as giving the LPNs discretion as to how to proceed if patients are reported missing. This is covered by item 4, subsec. A-12, which directs that a report be prepared ''on missing patients'' and that it be given to the nurse on station 1. Although this station customarily is manned by an LPN, the document does not signify whether the latter retains the report for action or simply transmits it to higher authority.

[39] It is not without significance that the Board has deemed the availability of a ''disaster manual'' as a factor that lessened the degree of independent judgment exercised by LPNs. See, e.g., *Phelps Community*, supra, 295 NLRB at 492.

call in sick or to report absence on other grounds. It appears that no authority was exercised in this connection. According to Cullinan if an aide called in sick, she would record the information as taken by herself, or as reported by anyone else who may have taken the call, on a ''report off'' slip. That document merely listed the name, date, and reason for the absence.[40] The completed form would be placed under Helterbran's door. There was no evidence that anyone in this chain of communication, short of Helterbran, had or exercised any authority to excuse or impose discipline for absence or lateness. Here again, there is no evidence that judgment or authority was exercised by any LPN.

f. *Cullinan and Bishop were not Section 2(11) Supervisors*

To make its case, the Respondent need merely substantiate that the LPNs hold or exercise any one of the enumerated functions set forth in Section 2(11) of the Act. See, e.g., *Ohio River Co*., 303 NLRB 696 (1990). Here, however, Cullinan and her counterparts do not appear to promote, reward, furlough, recall, determine wages, approve leave, hire, discharge,[41] or recommend such action. Aside from the foregoing, the LPNs' involvement in the disciplinary process, at times material, was restricted to authority to protect the patients and the home from destructive behavior, a delegation so rarely invoked, that it was shown to have been implemented only on direction of a registered nurse. Moreover, any authority to choose, assign, or transfer subordinates is held and exercised by LPNs within severe constraints, namely, only where last-minute absenteeism creates shortages in coverage. In the area of evaluations, the ratings prepared by the LPNs would be diluted by the fact that the same aide would be subject to evaluation by more than one LPN, and further reduced in import by the fact that the LPN would not counsel or otherwise confront employees concerning the results. Moreover, these ratings are destroyed, rather than preserved in personnel files, and hence it is difficult to imagine that the actions of any particular LPN were expected to impact on the latter's work situation or tenure.

In this light the supervisory issue turns essentially on whether the record substantiates that LPNs at the time of Cullinan's discharge directed aides and/or orderlies ''responsibly'' and under conditions reflecting the ''the use of independent judgment.'' There is no question that the LPNs direct the aides in furtherance of patient care. However, pursuant to Section 2(11), this attribute of supervisory status must be effected ''responsibly'' and must entail ''the use of independent judgment.''

The inquiry under this standard is always complicated where applied to individuals who perform highly responsible work, pursuant to specialized skills, acquired through special training and education. Work at higher levels of intellectual accomplishment will always entail a significant element of independent judgment.[42] If those individuals hire, fire, discipline, or reward, or effectively recommend such action, they clearly are beyond the purview of the Act. But, what of those who, like the LPNs, do not possess such authority? Does the Act turn away this group simply because they *are assisted by others with lesser skills* in pursuing specialized or intellectual endeavors? The Board traditionally has said, ''No!'' See, e.g., *Neighborhood Legal Services*, 236 NLRB 1269, 1273 fn. 9 (1978) (attorneys); *Sav-On Drugs*, 243 NLRB 859, 860 (1979) (pharmacists); *Southern Bleachery & Print Works*, 115 NLRB 787, 791 (1956) (skilled craftsmen); and *Golden West Broadcasters—KTLA*, 215 NLRB 760, 762 fn. 4 (1974) (remote TV directors).

The precedent attests to the generic thrust of this policy; it by no means is a special creature of the health care industry. At the same type, there is evidence that Congress intended this formulation to extend to health care professionals in this category. Thus, the House and Senate Reports which accompanied their respective versions of the Health Care Amendments of 1974 specifically endorsed this hedge against overzealous supervisory determinations, stating:

> The Committee notes that the Board has carefully avoided applying the definition of ''supervisor'' to a health care professional who gives direction to other employees in the exercise of professional judgment, which direction is incidental [to] . . . the professional's treatment of patients, and thus is not the exercise of supervisory authority in the interest of the employer.
>
> The Committee expects the Board to continue evaluating the facts of each case in this manner when making its determinations. S. Rep No. 766, 93d Cong., 2d Sess. H.R Report No. 93–1051, 93d Cong., 2d Sess.

This principle was accepted as a declaration of Congressional intent by every circuit court that considered the issue, including, at least initially, the Sixth Circuit.

Thus, in 1981, the Sixth Circuit Court of Appeals in *Beverly Manor Convalescent Centers v. NLRB*, 661 F.2d 1095 (6th Cir. 1981), acknowledged special care was necessary in such a context:

[40] RX–4(A); RX–7(a) through (h). Cullinan testified that the slip could have been completed by an aide as well as an LPN. Bishop averred that most commonly it would be handled by an LPN or RN.

[41] Not a single witness testified or suggested that LPNs are authorized to effect or recommend discharge under any circumstances. The Respondent's attorney, however, appears to interpret a document as indicating that LPNs at a meeting on March 7, 1991, were trained to effect discharge. Thus, the Respondent's brief states that at this meeting ''certain terminable offenses . . . were identified for the LPNs *to enforce* together with a protocol for termination.'' The document, however, merely states that the nurses in attendance were to be informed of the grounds for ''immediate discharge'' as well as the ''protocol'' to be followed in effecting discharge. RX–1(a). It does not state or imply that the LPNs possessed such authority and, if that were the intent, surely the Respondent could have substantiated that this was the case through direct testimony. There was none. Instead, the more probable interpretation is substantiated by John Bishop's uncontradicted testimony the discharge issues were discussed in context of behavioral standards expected of, and imposed on, the entire staff. I also credit Bishop's denial that he ever attended a meeting at which the LPNs were informed of the procedure to be followed in effecting any form of discipline, suspend, or issue reprimands of a disciplinary nature to subordinates.

[42] The most extreme example is the ''professional employee'' referred to in Sec. 2(12) that must be engaged in work predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work and must perform work which involves the consistent exercise of discretion and judgment in its performance.

> The problem in application is due to the fact that ''health care professionals'' often exercise certain kinds of supervisory authority in treating those under their care, but they do so in the exercise of independent *professional* judgment not always strictly ''in the interest of the employer.''

The court went on to suggest acceptance of Congressional will, explaining the relevant inquiry as follows:

> [I]t is the intent of Congress in the health care field that the Board ''distinguish true supervisory authority from the 'professional' judgment and discretion involved in patient care. . . .'' The distinction must be made, not because professional care is a matter of routine involving no independent judgment, but because the independent judgment which is necessarily involved in patient care, even if otherwise supervisory in character, is not always strictly ''in the interest of the employer.'' The exercise of proper independent professional judgment in directing employees, therefore, should not alone align the professional with his employer as a supervisor. [661 F.2d at 1101.]

It is important to note that the Sixth Circuit did not diminish, disparage, nor in any sense discount this unambiguous attempt by key committees in both the Senate and the House of Representatives to preserve the distinction between implementation of professional responsibility and that exercised on behalf of traditional employer interests. Nevertheless, the case was remanded to the Board on the ground the Regional Director's analysis as ''a *sub silentio* departure from the analytical method employed by the Board, pre-1974, and, therefore, a substantial deviation from the ''Congressional directive'' in 1974. [661 F.2d at 1103.]

Following the remand, the case was again reviewed by the Sixth Circuit in 1984. See *Beverly Enterprises v. NLRB*, 727 F.2d 591 (6th Cir. 1984). As it had done earlier, the court reiterated the governing test stating that:

> [If the LPNs exercise] independent professional judgment of a supervisory character . . . primarily in connection with patient care, not in the interest of his or her employer, then, pursuant to the above opinion and the present state of the law, LPNs . . . are properly included in the bargaining unit. On the contrary, should the exercise of the LPNs independent professional judgment of a supervisory character . . . [be] in the interest of his or her employer, and not merely in the interest of patient care, then, equally clear LPNs . . . should not be included in the unit. [661 F.2d at 1105; 727 F.2d at 593.]

Consistent with the foregoing, other courts have recognized the Senate Report as binding legislative history, and have reviewed Board determinations in this area in accord with the definition set forth in the 1981 and 1984 *Beverly* remands. See, e.g., *Misericordia Hospital v. NLRB*, 623 F.2d 808, 816 (2d Cir. 1980); *NLRB v. St. Mary's Home*, 690 F.2d 1062, 1066–1067 (4th Cir. 1982); *NLRB v. Res-Care, Inc*., 705 F.2d 1461, 1468 (7th Cir. 1983); *Waverly-Cedar Falls Center v. NLRB*, 933 F.2d 626 (8th Cir. 1991); *NLRB v. St. Francis Hospital*, 601 F.2d 404, 420 fn. 17 (9th Cir. 1979).

The Sixth Circuit in 1987 appeared to careen from this line of authority. In *NLRB v. Beacon Light Christian Nursing Home*, 825 F.2d 1076 (6th Cir. 1987), that court rejected a Board finding that LPNs were not supervisors. In this instance, the disagreement was more than factual and there was no remand. Instead, the court denied enforcement of a bargaining order, deeming the LPNs to be supervisors, on the following rationale:

> Where nurses otherwise meet the statutory definition of supervisors, they are not disqualified [from being supervisors] because the activity they are supervising is patient care. There is no support in either the text of the Taft-Hartley Act or the legislative history of that Act for such a position. Upon our reading of the statute, we think that the law means exactly what it says, that individuals who . . . are supervisors, whether they are employed in the health care industry or any other industry.

In due respect, the court made no attempt to reconcile or even discuss the position apparently taken by that court in 1981 and 1984 in the *Beverly* cases. The 1974 Senate Report was acknowledged, but without comment other than the unexplained statement that ''The legislative history to the Health Care Amendments of 1974 . . . supports our conclusion as well.'' It is difficult to reconcile the court's rationale with the prior applications of Congressional intent.

The Sixth Circuit's position was clarified in 1992, when it denied enforcement of another bargaining order, concluding that RNs were improperly found to be eligible for union representation. *Beverly California Corp. v. NLRB*, 140 LRRM 2960 (6th Cir. 1992). On authority of *Beacon Light*, supra, the court reasoned that independent judgment exercised in the health care industry warrants no difference in treatment than elsewhere and that, in the case of health care professionals, it is of no moment that the ''activity they are supervising is patient care.'' Seeing no need to draw a distinction between authority exercised in the area of health care, and that outside that area, the court reasoned that pure professional judgment is always exercised in the interest of the employer. The court also rejected the Senate Report as indicative of Congressional intent, specifically stating:

> [T]he Supreme Court would [not] be likely to hold that a report issued by a single Congressional committee in 1974—a report not passed by either house and not presented to the President—could somehow alter the meaning of a statute enacted by two-thirds vote of each house of Congress in 1947. [*Beverly California Corp. v. NLRB*, supra at fn. 7.]

Although the 1992 decision deemed the earlier *Beverly* cases, supra, as ''not to the contrary,'' there, as in *Beacon*, it is difficult to reconcile the rationale and result from the test and reasoning behind the remands in the earlier *Beverly* cases.

In any event, counsel for the Respondent has filed a posthearing brief, which neglects to furnish to me a single holding that would support his client's position at the Board level. In stressing these more recent Sixth Circuit reversals, the Respondent states, ''it is a needless exercise to debate

what might be the law elsewhere.''[43] Thus, counsel for the Respondent makes no attempt to address the question of whether any independent judgment in directing subordinates is confined to the LPNs' professional duties in the area of health care, or also entails authority with respect to nonprofessional, personnel actions in the interest of the employer.

In any event, whatever the value in the observation, the 1987 and 1992 decisions by the Sixth Circuit are explainable on the basis of considerations not to be found in the case at hand. Thus, *Beverly of California*, supra, involved registered nurses who generally are integrated critically with management echelons, who oversee the LPNs, and who customarily are the ranking management representative on duty during evening and night shifts. See, e.g., *Lincoln Lutheran of Racine*, 290 NLRB 1077 (1988). Indeed, the Board's nonsupervisory finding in that case was imperiled by a highly ''remarkable'' ratio of only 1 supervisor for every 31 rank-and-file employees.[44]

Major distinctions also exist from the record considered in *Beacon Light*, supra. There, the court stated that ''the LPNs and RNs have virtually the same duties to direct patient care and supervise and instruct aides.'' There, no RN was present on most shifts. There, the evaluation of aides by the LPN became a part of the aide's personnel file, and was considered in promotion and demotion decisions. There, the LPNs completed counseling forms which were considered ''disciplinary reports'' and which ''normally result[ed] in formal disciplinary action after three or four are lodged for the same violation of the rules.''[45] Not one of these important vestiges of authority were held, during the relevant time frame, by Cullinan and her fellow LPNs. Moreover, unlike *Beacon* where the LPNs and RNs assigned aides to patients, here patients are assigned to aides routinely by RNs, with no single LPN having authority to alter those schedules except under an authorized scheme deployed only where the staff is undermanned.

In sum, this is simply a case where at times prior to the discharge, the Respondent was intent on using the LPNs to monitor, direct, and correct in the health care area for which they were responsible, but not willing to entrust them with authority to enforce these actions through the highly judgmental process of reward and discipline. Thus, in the case of these trained health care workers, authority to direct aides and orderlies to conform with written rules and policies and to provide health care in a manner compatible with the health, safety, and comfort of the resident was more a matter of observation and common sense than responsibly exercised independent judgment. Accordingly, it is concluded that during her employment with the Respondent, Cullinan and the other LPNs routinely directed subordinates solely in connection with patient care, and lacked any and all supervisory indicia required under Section 2(11) of the Act to exempt them from statutory protection.[46]

IV. THE MOTION TO DISQUALIFY

A. *Timeliness*

After close of the hearing, counsel for the Respondent filed a motion that I disqualify myself from further participation in this proceeding. Under Section 102.37, such a motion is to be filed ''with due diligence'' and ''promptly upon discovery of the alleged facts.'' The Respondent's filing fails to meet that requirement. It is founded entirely in matters occurring prior to June 23, 1992,[47] when the hearing was closed. That same day, during the hearing, Attorney Shaffer upbraided me:

> Now, you've made very clear on the record your bias and prejudice against the defense that the Employer is presenting. You've made snide remarks about counsel. You've made unfair and unsolicited criticisms of witnesses. You have drawn opinions and conclusions from documents you haven't read. And you've come in here and told us about your experience in the nursing home

[43] This either means that counsel is of the view that his position could not be sustained under Board precedent, or that he has abdicated to me the responsibility for researching Board authority that would support dismissal of the complaint. Surely, counsel is aware that, irrespective of the Sixth Circuit's view, as an administrative law judge, I am duty bound to follow Board precedent, until reversed by the Supreme Court. See, e.g., *Insurance Agents (Prudential Insurance)*, 119 NLRB 768 (1957). For, it is the endeavor and duty of the Board to define a uniform national labor policy, as distinct from a patchwork of geographically diverse rules in order to please certain authorities, but which, at the same time, would foster, rather than diffuse ''diversities and conflicts likely to result from a variety of local . . . attitudes toward labor controversies . . . .'' *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 242–243 (1959). Moreover, even though this case arises in the Sixth Circuit, there is no guarantee that a review proceeding will take place in that jurisdiction. See, e.g., *Harrison Steel Castings Co. v. NLRB*, 923 F.2d 542 (7th Cir. 1991). For example, the Sixth Circuit's recent decision in *Beverly of California*, supra, happened to arise from a nursing home located in Johnstown, Pennsylvania. Thus, the Board might guess, but is not in a position to anticipate with precision the locus of appellate jurisdiction. For all theses reasons, the Board is not required, on either legal or pragmatic grounds, to automatically follow an adverse court decision. Instead, it, respectfully, will regard such a ruling merely as the law of that particular case.

[44] This contrasts with the instant case, where, at least on the day shift, a finding that LPNs are nonsupervisors will result in ratio of 1 supervisor for 18 employees. This would drop on other shifts, and indeed that on daylight might well be overstated by the inclusion of certain specialists, namely, the bath aide, a med tech, and two rehabilitation aides, all of whom may not be part of the nursing department. Whatever their status, the Respondent, without reference to precedent, states that, ''This ratio [18 to 1] is inadequate for the purpose of managing the care of patients in a nursing home.'' This overlooks the fact that the supervisory load is offset by the presence of three to four persons who exercise nonsupervisory, lead authority in the area of patient care. In any event, the Board has declared a ratio of ''about 1 to 18'' that would ensue under a nonsupervisory finding to be no more unreasonable than a ratio of ''1 to 3'' that would exist in the event of a supervisory finding. Those figures, therefore, were declared inconclusive in *Phelps Community Medical*, supra, 295 NLRB at 492.

[45] The Sixth Circuit itself distinguished *Beacon* on similar grounds in *Highland Superstores v. NLRB*, 927 F.2d 918 (6th Cir. 1991). The Board adopted this tact in *Ohio Masonic Home*, supra, 295 NLRB at 395.

[46] ''The burden of proving supervisory status rests on the party alleging that such status exists.'' *Rahco, Inc.*, 265 NLRB 235, 247 (1982).

[47] All dates refer to 1992.

> industry without regard for what this company actually does. [Tr. 411.][48]

These allegations are matched if not exceeded in ugliness only by the sworn accusations set forth in the affidavits signed and sworn to by Shaffer, and his associate, Gayle Montalto. These attorneys have stated under oath that in addition to prejudging the ultimate issue, I accused a witness of lying and brought a witness to tears by making her a ''target.'' The conduct attributed to me is lacking in ambiguity and allows no room for hesitation. Were charges of such a nature honestly held, it would be peculiar, at the least, that an attorney with the proclaimed experience of Shaffer would do anything other than bring the trial to an immediate halt.

Yet, not only did the trial proceed to its conclusion, but the Respondent's attorneys agreed to participate in a joint examination of its files to commence on June 24, the day after the hearing's close. On that very date, the Respondent filed a motion to reopen the record to include certain business records not offered during the hearing. (ALJ Exh. 1(a).) This motion, in significant part, was opposed by the General Counsel and Charging Party. (ALJ Exhs. 1(d) and (e).) Ancillary to this issue, the Respondent submitted to me no less than three statements in support of its position. ALJ Exhs. 1(c), (h), and (j). Not once was there intimation of any intention to raise issues as to the propriety of the proceeding. After reviewing the motion against the record and researching the matter, on July 29, I issued my ruling (ALJ Exh. 1(i)) in which all aspects of that motion were denied, except where conceded by the General Counsel and the Charging Party. In ruling against the Respondent, I stated, inter alia:

> [I]t is noted that more than four months before the hearing opened, the Respondent, on February 3, 1992, filed its answer to the complaint, affirmatively declaring that the alleged discriminatee, Sandra Cullinan ''was employed as a supervisor . . . and, thus, neither she nor the activities which she allegedly engaged in are protected by the Act.'' Having raised the issue, it was incumbent upon the Respondent to conduct a diligent search and to proffer, at the hearing, all documents relevant and necessary to substantiate its proof responsibility in that regard. *Publishers Printing Company, Inc*., 272 NLRB 1027, n. 1 (1984). Yet, the Respondent does not deny that proposed exhibits 23, 24, 25, 26 and 27 were known to fit a mold of relevance, were in its files, and, as such, were discoverable at that time. The rules requiring that litigation be brought to an end through an orderly, systematic, and efficient process take precedence over the Respondent's failure to do earlier, what it proved capable of doing following close of its case and the hearing itself. From all appearances, the posthearing search provided a convenient opportunity for the Respondent to canvass its very own business records with greater depth and thoroughness than on prior occasions. This fortuity did not warrant a change in the course of the litigation and would hardly support a conclusion that the documents thereby uncovered ''were somehow unavailable to Respondent at the time of the hearing.'' *Arrow Elastic Corporation*, 230 NLRB 110, n. 1 (1977), enf'd 573 F.2d 702 (1st Cir. 1978). In the circumstances, the record will not be reopened to entertain that ''which Respondent could have, and clearly should have, litigated at the hearing.'' *California Pacific Signs, Inc*., 233 NLRB 450 (1977); *Talbert Manufacturing, Inc*., 250 NLRB 174, n. 1 (1980).

Two weeks later, on August 12, the Respondent filed the instant motion seeking a new trial before a different judge.

The foregoing reveals that the effort to disqualify emerged well after any substantiating facts would have become known to the moving party, and only after, with knowledge of any such facts, the Respondent sought intervention by the judge to resolve a posthearing dispute among counsel. The Respondent at that stage caused the proponents of the complaint to commit time and resources in opposition to its posthearing effort to supplement the record. The attempt to reopen and the several filings made by the Respondent in support were totally inconsistent with the existence of an intent to challenge the propriety of the proceeding or to claim that I was unfit to render fair and impartial judgment on the issues presented. As matters turned out, the recusal effort would first become manifest only after the Respondent received an adverse ruling on the motion to reopen.[49] In this light, the effort to disqualify was untimely under Section 102.37 of the Board's Rules. Nevertheless, because of the grave, but unfounded, nature of the allegations, they must be addressed on the merits.

B. *The Allegations of Misconduct*

The motion for disqualification is grounded on alleged misconduct on my part, categorized in the ''Memorandum in Support of Motion to Disqualify,'' as manifested by a rejection of evidence proffered by the Respondent without objection, prejudgment of issues, and a variety of ''sarcastic'' remarks addressed to David Shaffer, the Respondent's attorney. Although my conclusions and ruling on the merits of the motion are set forth immediately below, they are supported by ''Appendix B'' which has been attached to this decision, and

[48] My response to these accusations appears on the record at Tr. 412–413. Needless to say, these accusations are devoid of foundation. Indeed, the most vicious seem to have vanished from the Respondent's filings in support of disqualification. In those documents, there was no reference to ''unsolicited criticisms of witnesses,'' and the inherently curious charge that I had ''drawn opinions and conclusions from documents . . . [I hadn't] even read'' had also fallen by the wayside.

[49] In opposition to the motion to disqualify, counsel for the General Counsel asserts that the instant motion ''is an attempt to achieve a trial de novo before a different Administrative Law Judge to enable [the Respondent] . . . to present evidence which it should have assembled and produced at the proceeding before Judge Harmatz.'' Although the Respondent's motive for the belated filing need not be explored, it is necessary to correct a faulty observation in a reply memorandum subsequently filed by its counsel. This latter document argues that the General Counsel's observation is ''ridiculous on its face'' because the Respondent has ''a complete remedy'' through its ''right to appeal.'' However, as the General Counsel observes correctly, recusal would provide immediate, absolute relief from the adverse evidentiary ruling. An appeal, on the other hand, offers no guarantees, for relief would be available in that event only if the Respondent were able to convince a reviewing authority that, prior to trial, it had no access to relevant documents which rested in its own files.

which contains a specific analysis of the record in light of accusations and representations contained in the sworn affidavits offered in support of the motion.

Preliminarily, it is necessary to avow the obvious, namely, that my duties in this case were undertaken with an abiding interest in providing all parties a fair trial. There was no reason to do otherwise. I had no prior acquaintanceship with the case, the parties, or their counsel. At the same time, it was my responsibility to assure a record, not only complete, but one which contained as fair and honest accounting of the facts as the adversary system might allow. To that end, as always, it was my intention, aggressively, to preserve and protect the record from the clutter and distraction of incompetent and nonprobative proffers—always inimical to timely decision and effective review—and to provide guidance to counsel as to what was expected of them by communicating on the record and in straightforward terms my reasons for acting for or against their wishes.

The thought and energy involved is not always appreciated. It is a matter of record that my efforts in this respect were met by Attorney Shaffer with ridicule and contempt. It was my distinct impression that he held a circumscribed view of the role and authority of the administrative law judge, and that his conduct might have stemmed from a faulty perception in that regard. For example, at several points during the hearing, and again in support of the instant motion, he complained, often and bitterly, that the judge excluded evidence *without objection of counsel*, or even that I provided *a rationale for actions* though *unsolicited by an attorney*.

The authority of the administrative law judge is set forth generally in the Board's Rules and Regulations. Section 102.35 states:

> It shall be the duty of the administrative law judge to inquire fully into the facts as to whether the respondent has engaged in or is engaging in an unfair labor practice affecting commerce as set forth in the complaint or amended complaint . . . .

In furtherance thereof, subsection 102.35(f) of the Board's Rules authorizes the administrative law judge to ''regulate the course of the hearing.'' Subsection 102.35(k) entrusts the judge with power ''[t]o call, examine, and cross-examine witnesses and to introduce into the record documentary or other evidence.''

The exercise of this authority is by no means contingent on the wisdom, good sense, qualifications, disinterest, or perceptions of others. The procedural scheme assumes that the independence, objectivity, and expertise of the administrative law judge would lead to a fair, orderly hearing, and that should unruly, impertinent, and ponderous behavior threaten the process, the judge, not opposing counsel, should intervene to control that which by definition impinges on that endeavor. Simply put, the judge does not sit as a marmorean witness to endless maneuvering that tends to obscure truth, to cause delay, or, in the end, to prevent a just result.

In this instance, the allegations of bias are not only insubstantial, but nothing more than an extension of Attorney Shaffer's will to manipulate facts and his rebellious disapproval of my efforts, with or without his cooperation, to control the process in accordance with delegated authority, established practice, and rules of evidence. His incessant challenges to the most ordinary rulings, as well as his predetermined agenda, too often threatened to obfuscate, to prolong the hearing without warrant, and to burden the record with the trivial and irrelevant. There is no question that Shaffer and I hold sharp differences in a number of areas that could affect the course of litigation. We obviously do not place identical emphasis on detail, accuracy,[50] effective organization, and pertinence. These differences, coupled with my greater authority with respect to the course and shape of the hearing, have been confused by counsel into a baseless, if not meretricious, claim of bias.

In the final analysis, there was neither bias, prejudice, nor the appearance thereof associated with the trial of this case. When the Respondent's evidentiary pursuits were rejected, a rationale was always provided. When its position was sound, it was sustained. Moreover, the critical supervisory issue was in doubt until the opportunity to review the record and the relevant authorities presented itself. Not once was there the slightest suggestion at the hearing that a determination had been reached on the ultimate issue in dispute. Had that been the case, counsel for the Respondent would have raised the recusal issue in timely fashion, and without need for an inventive approach to facts of record.

For all the above reasons, the motion for disqualification is nonmeritorous both because untimely within the meaning of Section 102.37 of the Board's Rules and Regulations, and, as detailed in ''Appendix B,'' insubstantial as a matter of fact and law. The motion is denied.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) of the Act by questioning an employee concerning his union sentiment, and by informing an employee that his job was in jeopardy because of his suspected involvement in activity protected by Section 7 of the Act.

4. The Respondent violated Section 8(a)(3) and (1) of the Act by on June 18, 1991, discharging Sandra Cullinan in reprisal for her union and other activity protected by Section 7 of the Act.

5. The above unfair labor practices are unfair labor practices having an affect on commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, it shall be recommended that it be or-

[50] The standard of care manifested throughout this proceeding is not only evident on the face of the record, but also in the Respondent's various filings including those in support of the motion to reopen, the posthearing brief on the merits, and the affidavits in support of the motion to disqualify. In the second line of his memorandum in support of motion to disqualify, Shaffer opens his argument with a major undetected inadvertence. Thus, in attempting to describe an aspect of Board policy, he states:

> The National Labor Relations Board requires that its judges avoid ''even the appearance of impartiality.''

dered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

It having been determined that the Respondent unlawfully discharged Sandra Cullinan, it shall be recommended that the Respondent be ordered to offer her immediate reinstatement to her former position, and to make her whole for any loss of earnings or other benefits she might have sustained between the date of discharge and the date of a proper offer of reinstatement. The backpay shall be computed on a quarterly basis as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), and reduced by any net interim earnings, and shall include interest in accord with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[51]

ORDER

The Respondent, Manor West, Inc., Austintown, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Questioning employees concerning their union sentiment.

(b) Threatening employees with discharge because of suspected or actual participation in activity protected by Section 7 of the Act.

(c) Discouraging membership in a labor organization or participation in concerted activity for mutual aid and protection by discharging or in any other manner discriminating against an employee with respect to wages, hours, or other terms and conditions of employment.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Sandra Cullinan immediate reinstatement to her former position, discharging if necessary any replacement subsequently hired to that job, or if nonexistent, to a substantially equivalent position, and make her whole for losses sustained by reason of the discrimination against her, with interest, as set forth in the remedy section of this decision.

(b) Remove from its files, delete, and expunge any and all reference to the unlawful termination of Sandra Cullinan, notifying her that the action has been taken, and that the termination will not be used against her in the future.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facility in Austintown, Ohio, copies of the attached notice marked ''Appendix C.''[52] Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[51] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[52] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX B

The Representations in Support of the Motion to Disqualify

1. Preliminary statement

The charge of bias is a serious one. Where a judge has engaged in conduct which is inappropriate and gratuitous, he or she should step aside or be fair game for removal actions. But what of unfounded requests for removal? In such cases—whether out of a careless approach to fact or malice—the attempt to disqualify would entail a calculated, yet unwarranted, disruption of the quasi-judicial processes and a major inconvenience to other parties.

Although history fails to demonstrate enthusiasm for enforcement, restraints are in place as a hedge against the pretenders. Section 102.37 of the Board's Rules and Regulations seeks to discourage baseless allegations by requiring that the representations offered in support of a motion to disqualify be sworn. Ethical considerations also play a role in the quest for objectivity and truth. Thus, disciplinary rule 8–102(B), *The American Bar Association, Code of Professional Responsibility and Canons of Judicial Ethics*, defines as misconduct the expression of ''false and untrue and unfounded charges of misconduct against an ''adjudicatory officer.'' *In re Meeker*, 414 P.2d 862, 869. The constraint applies to any allegation which an attorney ''knew, or should have known to be false.'' Violation of the standard has been described as:

> [U]nethical and unprofessional conduct tending to bring the bench and bar into disrepute and to undermine public confidence in the integrity of the judicial process. [See *Kentucky Bar Assn. v. Heleringer*, 602 SW 165 (KY, 1980).]

In this light, one would assume that a seasoned member of the bar would exercise extreme caution to ensure factual accuracy where the judge or a reviewing authority is asked to inconvenience other parties and to alter the course of a proceeding by in effect granting a new trial.

2. The accusations

a. *The sequestration ruling*

Shaffer, from the earliest moments of the trial, had targeted me as an adversary. His reaction to a routine ruling on the General Counsel's request for sequestration was illus-

trative.[53] He claims that, at the earliest stages of the trial, he was ''berated'' by reason of his position in this regard.

Thus, at the inception of the trial, the General Counsel moved for sequestration. The Respondent requested that he be permitted to retain as his representative, Poppelreuter, the administrator, when Helterbran, the director of nursing, was testifying, and Helterbran while Poppelreuter was on the stand. (Tr. 10.) On the face of the pleadings, it was fair to assume that they would be key witnesses. The Respondent's answer denied, inter alia, that Cullinan was discharged for unlawful reasons, while affirmatively stating that she was a statutory supervisor. GCX–1(c). It was presumable that Helterbran, who effected the discharge, and Poppelreuter, who made the decision, were conversant with both the reason for the termination and the supervisory issue.[54] Accordingly, to permit one key witness to testimony in the presence of the other, obviously, would rob sequestration of all meaning. After the Respondent was limited to a single representative of choice, and sequestration implemented, Shaffer was emphatic in his attack on this routine exercise of discretion. (Tr. 11.)

He protested that I had wrongfully denied him a representative. When he *reiterated* that I was to blame for his inconvenience, he was simply informed that he was *not* compelled to make either Helterbran or Poppelreuter his representative, and that his situation was caused by his own choice. (Tr. 9, 10, 11–12.) He would not let up. On the second day of the hearing, he again found it necessary to interrupt me, once more to carp at the sequestration ruling. (Tr. 259.) As shall be seen below, the sequestion matter was not the only occasion in which Attorney Shaffer and his associate would turn a routine exercise of authority into attack on my competence.

b. *The marking of exhibits*

A second major irritant derived from my rejection of the method used by Shaffer in ''premarking'' the Respondent's exhibits. In this connection, the matter opened when Shaffer inquired as to whether I had special rules regarding the premarking of exhibits. (Tr. 24.) I replied that I do, that I never permit premarking because the exhibits come in out of sequence and lead to confusion. However, at that juncture, I advised that, because he had already premarked the exhibits, he would be indulged.

Later, however, it became evident that premarking would lead to a totally convoluted record and hence was unacceptable. Thus, when the Respondent offered the same category of documents, for the same purpose, ostensibly signed by the same witness, yet premarked Respondent's Exhibits 3, 10, 11, 12, and 13, I reconsidered. I directed that these documents be grouped and remarked as Respondent's Exhibits 3(a) through (e), explaining:

> I am responsible, not only for a decision, but an orderly record . . . [a]nd to have the same subject matter jumping seven exhibits is not an orderly record. [Tr. 129.]

As he had from the outset, Shaffer invoked the fact that he had cleared this procedure with Associate Chief Administrative Law Judge John M. Dyer during a prehearing conference call. Shaffer was informed that I, not Judge Dyer, was responsible for the case.

As events unfolded, it became increasingly evident that the premarking reflected a scatter-shot approach. The premarking was so incoherent that one could assume the papers had been tossed from the top of a building, gathered from the street below, then marked in the order of retrieval. Although premarking always creates sequential problems, that was only an incidental defect in the Respondent's approach to building an exhibit folio. Thus, its marking was thoroughly unstructured in terms of the nature of the document, its source, or content.[55] Those that would question this observation need only compare the original markings still visible on some of the documents, against the manner in which they now appear in the record.[56]

[53] The opening of the trial was delayed. Gayle M. Montalto, the associate to Shaffer submitted an affidavit which states that ''Judge Harmatz blamed Mr. Shaffer for causing the delay and he was openly angry with Mr. Shaffer before the proceeding began.'' This representation, though sworn, is inaccurate. It goes unmentioned in any document signed by Shaffer. In fact, the proceeding was delayed to permit the General Counsel to peruse voluminous material returned at the trial by the Respondent pursuant to subpoena. The Respondent was under no obligation to submit this data at any earlier time, and Attorney Shaffer was not and could not be faulted for the delay. Concern was exhibited by me on that occasion, but only toward the General Counsel, who, at first, did not impress me as entirely responsive to my appeals that she proceed with sectors of her case that were unaffected by unexamined documents, while reviewing the remaining subpoenaed materials under conditions that would not detract from the hearing.

[54] It is not without significance that Shaffer, at several points, suggested on the record that there was no factual dispute on the motivation issue, and that, for that reason, he would not examine either Poppelreuter or Helterbran in that regard. He did, however, in his posthearing brief, argue that Cullinan was discharged for ''disloyalty.'' Having declined to elicit any such testimony from either Poppelreuter or Helterbran, Attorney Shaffer failed to develop a factual basis for this rationale.

[55] Cocounsel for the Respondent, Montalto, expressed chagrin at my attempt to organize the record in this respect. In her affidavit, she opines:

> I was amazed that Judge Harmatz would find premarked exhibits was obstructive. I was also amazed that the Judge could not manage to deal with a record which referenced exhibits submitted out of consecutive order.

In cases presenting extensive documentation, premarking is always ''obstructive.'' Apart from problems of chronology, there are no guarantees that all premarked exhibits will be received or, for that matter, even offered. For example, the Respondent's counsel claims to have premarked 170 documents, yet, according to my count, only 116 were received in evidence, with only 20 of the balance offered and rejected. This shortfall obviously would have produced gaps in exhibit numbers which would lead to confusion and entirely avoidable, problems in referencing and inventorying. Most important, however, is the fact that, as indicated above, the premarking had no regard for substantive organization, and, consequently, tended to enhance the risk of oversight and encumber the reference process.

[56] For example, documents that had been issued by LPN John Bishop reflecting his enforcement of the Respondent's policies against aides, had been premarked as R. Exhs. 30, 33, and 40; they appear in the record as R. Exhs. 6(a) through (d). Call-in forms, completed by Bishop that had been premarked as R. Exhs. 53, 54, 56, 69, 70, 75, and 83 were renumbered as R. Exhs. 7(a) through (h). Corrective action forms signed by LPNs that were not called to testify are now collected in R. Exhs. 18(a) through (nn), but were premarked as R. Exhs. 32, 34 through 39, 41 through 51, and 130 through 151.

When this hearing was closed, all documents of the same ilk had been collected under the same exhibit number and, with exception of supplementation, appear in the order in which they were presented for authentication. There was no ingenuity in this approach, and I cannot lay claim to being the author.[57] In this case, it has produced a document file, whereby the Respondent's ''170'' documents were consolidated under 27 separate exhibit numbers. One need only know the subject matter to be in a position to locate a particular document with speed and efficiency.

Shaffer, though assisted by an associate, on a continuing basis, seemed unable to grasp the basic formula to be followed, namely, that documents of the same type, offered for the same purpose, especially if identified by the same witness, should be alphabetized under a single, consecutive number. He manifested his inability to proceed, at one point, by enlisting my assistance with the following comment:

> We're going to challenge your exhibit marking skills here, Judge, because we're going to give you some that are numbered from 17 through 107 in three exhibits. [Tr. 136.]

On that occasion and others, I endeavored to assist Shaffer in conforming to the simplistic formula.[58] After the formula had been explained and demonstrated on several occasions, Shaffer still could not get it right, having attempted to lump in a single exhibit disciplinary forms and ''report off sheets,'' documents that obviously had no relation to each other.[59]

Although I sensed a noncooperative spirit, if not ''smarting'' from the outset, it would become apparent that my effort to provide systematic access to the numerous documents involved was viewed with utter contempt by the Respondent. In his memorandum in support of the motion to disqualify, Shaffer describes this directive as ''a source of hostility directed at me by Judge Harmatz and they were a source of on-going controversy and disruption.'' In fact, the record shows that any ''controversy'' was generated by Shaffer, and that the ''hostility'' was directed at me.

Thus, on the final day of the hearing, Shaffer sought to introduce a document which included an unrelated attachment. This triggered a critical comment on my part concerning the degree of thought that had not gone into preparation of the numerous documents, together with the observation that the still legible, original markings showed no logical sequence. Shaffer replied:

> Judge Harmatz, you know, I'm going—you have been the sole and complete author of the absolute confusion that has been created in the record here. It was your nitpicking personal subjective preference for numbering exhibits that has caused . . . us the most unbelievable confusion in trying to present a case that was already to go and was completely orderly. [Tr. 414.]

c. *Other miscellaneous allegations*

Whatever the explanation for Attorney Shaffer's resistive conduct at the trial, there is no excuse for the representations in his sworn affidavit, offered in support of his motion to disqualify. With a plethora of pejoratives,[60] he has gilded and twisted, if not actually misstated, a record which is there for all to examine. Facts are manipulated in order to portray routine rulings as insidious behavior. Why an experienced attorney would resort to such tactics is an unknown. Although it is unfortunate that these matters need be labored through a detailed analysis, this level of behavior must be exposed for what it is. To that end, major aspects of the affidavits submitted in support of recusal are analyzed below.[61]

ITEM 4. Shaffer states that ''from the commencement of the hearing and through its conclusion the following day, Judge Harmatz made repeated sarcastic and critical remarks of me and my client.'' The sworn averment that any such remarks were made concerning the Respondent or any of its representatives is defamatory and absolutely false. Although I hesitate to detract from the enormity of this misstatement, there is no question that Shaffer's performance during this hearing—as he felt mine—was worthy of prodding and correction.

ITEM 8. Here, Shaffer avers that I ''refused to allow evidence to be received into the record, even though there was no objection made to its offering.'' The assertion that there was a refusal to receive ''evidence'' into the record, at the least, involves a deceptive and inflammatory misuse of the English language. Nowhere does Attorney Shaffer identify such evidence. He could not do so because there was no evidence to exclude. Instead, as shall be seen, the incident merely involved curtailment of argumentative cross-examination, which took place only after the witness testified *repeatedly* that she had no evidence to give. (Tr. 158–152.)

[57] My acquaintance with this method of organizing massive exhibits dates back more than 30 years. In almost 20 years as an administrative law judge, it has been used over and again in cases involving numerous documents, without a whimper from counsel, and more often than not at their instance. Never had the arrangement fueled controversy, and not once had an attorney experienced difficulty in comprehending or adapting to the system.

[58] Tr. 136, 145. In her affidavit, Montalto states that she felt ''rushed'' in remarking the exhibits according to my directive. Whatever her situation, it is noted that counsel were provided time off the record to perform the task. It was my impression that we did not resume until the Respondent's counsel signaled that they were ready. There was neither denial of a request for additional time nor a claim that ample time had not been provided.

[59] Tr. 207. In addition, I directed that the Respondent remark sectors of R. Exhs. 18 as (bb) through (nn). (Tr. 333.) The exhibits were identified for the record and received on the basis of that instruction. Tr. 333–335. It apparently went unheeded and these documents appear as R. Exhs. 18 (ab) through (an).

[60] It would be an impossible venture, and I have not endeavored to explain away each and every disparaging characterization leveled by Shaffer and his associate. However, the general untrustworthiness of the various filings, both sworn and unsworn, that they have endorsed willingly in this case offer a sound barometer for weighing these comments as well.

[61] This is particularly necessary in light of counsel for the Respondent's misguided assertion that the allegations, whether or not valid, must be accepted by default because unchallenged. Thus, Attorney Shaffer stated in reply to the General Counsel's opposition to disqualification:

> Nowhere does the counsel for the General Counsel dispute the factual contentions (and affidavit evidence) attached to the motion. The allegations are therefore uncontroverted. By her silence . . . the General Counsel has tacitly conceded all the serious factual allegations upon which the recusal motion is predicated.

Thus, the incident arose during examination of the alleged discriminatee, Cullinan. On direct examination, Cullinan, in response to inquiry by the General Counsel, denied that she ever had been told that she was a ''charge nurse.'' On cross-examination by Shaffer, she indicated that she understood that position to have been occupied by an LPN that worked days, that it involved a 50-cent hourly premium and required additional paperwork. Shaffer then sought to equate the authority held by all LPNs with that held by the charge nurse, posing the following:

> Q. So each would have the same measure of authority over aides and orderlies, correct?
>
> A. I don't know, I wasn't a charge nurse.

Despite this response, Shaffer persisted, prompting my intervention to express my own difficulty understanding how the witness, having never held the position, could respond. (Tr. 149.) Attorney Shaffer argued back, ''she doesn't have to be a charge nurse to know what they do or if there is any difference between them.'' I suggested: ''If you have somebody who was a charge nurse and knows what they do, put her on.'' Although Attorney Shaffer later would do so, he insisted on wasting time through Cullinan, finally propounding:

> The fact that you weren't told you were a charge nurse, how did that impact on your job or your responsibility?

When the witness expressed confusion at this inquiry, Shaffer was cut off. Obviously, the comparison sought by Shaffer would be meaningless until a charge nurse testified that the position involved statutory indicia of supervisory status. Yet, Shaffer elected to grind out the comparison with one who at best could merely offer hearsay, and, who already, at least twice, had professed to a lack of knowledge of all elements of the position. He was cut off when it became obvious that the examination had become argumentative and nonproductive. There is absolutely no basis for the assertion that I ''refused to allow evidence to be received into the record . . . .''

ITEM 9. Shaffer avers that I, relying on the ''work product'' privilege, foreclosed him from questioning a witness even though ''the objection was not raised by anyone.'' This was not the case. On cross-examination, Shaffer questioned LPN John Bishop as to what was discussed at a meeting attended by Bishop, discriminatee Cullinan, and her attorney, Lynd. The General Counsel objected, stating that the inquiry ''involves conversations between attorneys and clients.'' Once posed, I solicited Shaffer's position on the objection. He observed that Bishop was not Lynd's client and therefore no attorney/client privilege attached. However, the ground for the objection was stated in broad terms, embracing ''conversations between attorneys and clients,'' and hence sufficient to include work product. The views of Shaffer were solicited in that regard. Shaffer stated that this was not work product, but offered no rationale or authority. The objection was sustained, along with the observation that conversations with witnesses preliminary to litigation were within the work product privilege. See, e.g., *Visual Scene v. Pilkington Bros*., 508 So.2d 437, 442–443 (Fla. App. 3 Dist. 1987).

In a major example of distortion, Shaffer avers that Judge Harmatz expressed his unsolicited opinion that a witness for Respondent ''could be lying.'' The allegation is highly inflammatory. Yet, no remark of this nature in the form of ''opinion'' or otherwise was expressed by me on or off the record to anyone. During the cited incident, Helterbran was on the stand. She identified documents as summaries of evaluations prepared by LPNs. She testified that the evaluations actually prepared by the LPNs had been destroyed. She acknowledged that, on their face, the documents did not identify input from any LPN. (R. Exhs. 15(a) through (r). Tr. 316.) All were rejected because cumulative to, and not an independent source of, evidence corroborative of Helterbran's testimony that LPNs made the underlying evaluations. In excluding them, I endeavored to explain to counsel:

> These documents, as they have been described by Ms. Helterbran, the documents that she prepared, they do not reflect upon her credibility in one way or the other with respect to the critical aspects of her testimony, mainly that the feedstock for this document comes from documents that are usually prepared or evaluations that are usually by LPN's.
>
> She prepared these documents, not as an LPN. They are not indicative of any evaluations prepared by LPN's . . . .

Nevertheless, Shaffer did not seem to ingest that these documents were collateral to Helterbran's testimony. As he persisted in his disagreement with my ruling, I attempted to explain further that the documents did not reenforce Helterbran's credibility because:

> They're parallel things. If she's lying about one, she could be lying about the other. If she's telling the truth about one, the other doesn't matter.
>
> The documents do not reflect on her credibility. They're irrelevant. It's quite possible . . . . It's quite possible that these documents could be based on judgments made below by people other than LPN's.
>
> You cannot tell from the face of these documents where the feedstock information came from or whether it originated . . . beyond the person who completed it, namely, Ms. Helterbran.
>
> Therefore, the document is of no use. It's of no greater value than Ms. Helterbran's testimony. It does not reenforce that testimony. [Tr. 317–318.]

Hopefully, Shaffer was aware that these remarks did not in any sense convey an opinion or evaluation of Helterbran's credulity. The documents were excluded because they failed on their face to reflect any input from LPNs and because they in no way reflected on credibility.[62]

Nevertheless, although Shaffer had made his record through Helterbran, and had been apprised thoroughly of the cumulative nature of Respondent's Exhibit 15, he insisted on a complete regurgitation of this process later that afternoon. (Tr. 481–491.) At that time, he again offered these precise

[62] His associate, Montalto, appears to labor under a complete misunderstanding as to what was going on. She states in her sworn affidavit that the document was excluded because of my ''opinion that the witness could be lying and her testimony would never be sufficient to corroborate and support the relevancy of the exhibits.'' Obviously, the opposite was true, for the documents were not relevant to determination of the witnesses' credibility, let alone any other issue.

exhibits through the author of the documents—Karlon Ware, a former charge nurse, now holding the position of ''staff development nurse.''[63] Ware obviously could not cure the defect specifically noted when the documents were offered through Helterbran. Shaffer would not give up, arguing that the summaries had to be based on collective evaluations by the LPNs. Again I explained:

> Except you're overlooking something; her testimony establishes that. This document does not establish that. This document stands for nothing without her testimony. So, if her testimony is true, you don't need the document. If her testimony is false, the document does not make it true. The document is purely collateral. The same problem that we had when some other witness testified that she . . . did these entries.
>
> . . . .
>
> [W]e've climbed this ladder once with Ms. Helterbran on the stand. I explained it to you then. I explained it to you just now. If you can't understand it, well, it's a personal problem.
>
> The objection is sustained.
>
> This document does not show that LPNs prepared evaluations. Her testimony shows that. Ms. Helterbran's testimony shows that. These documents do not show that.

It is astonishing that Shaffer in good faith has now made an allegation under oath to the effect that he walked away from this hearing and understood from the record that my explanations for the lack of relevance of Respondent's Exhibit 15 were indicative of adverse judgment on the quality or credulity of Helterbran's testimony.

ITEM 10. Here, Shaffer complains that I ''stopped'' his cross-examination when Shaffer ''*began* asking the Charging Party about LPN responsibilities as they related to the admission of patients.'' The record betrays this accusation. In fact, the interrogation of this witness had commenced four pages earlier, and was preceded with at least two denials that LPNs had authority in that area. (Tr. 162–163.) Later when Shaffer sought to reopen the matter, he was told by me that ''She [Cullinan] has no discretion over admission.'' With this, Shaffer stated: ''Judge, you're prejudging this thing.''[64] (Tr. 166.) He next represented that ''Company witnesses will testify that before they had an admissions nurse, the LPN's handled patient admissions.''[65] (Tr. 166.)

As matters turned out, the cross-examination was not at all ''stopped.'' Shaffer's cross-examination of Cullinan continued, ending only with her denial that there was ever a point during her employment that ''there was not an admissions nurse handling patient admissions.'' (Tr. 167.)

ITEM 11. Shaffer states that I showed my ''preconceived notions about Respondent's operations through interrupting his examination of Helterbran, arguing with her, and ''refusing to allow her answers to stand.'' This is an absolutely false portrayal of what transpired at transcript 362–364, the cited sector of the record.

ITEM 12. Here, Shaffer states that I showed ''his obvious prejudgment of Respondent's case'' in a colloquy pertaining to Respondent's Exhibit 6(a). This document bears the signature of LPN John Bishop and was introduced through him. My recollection and repeated reviews of Bishop's testimony show no problem with the document, which was received without objection. (Tr. 208.)

On further deliberation, I realized that Shaffer inadvertently referred to Respondent's Exhibit 6(a) when he must have meant Respondent's Exhibit 6(c). This document was a ''corrective action'' form signed by Bishop. The document on its face recorded the imposition of discipline. It was dated August 9, 1991, after the Cullinan discharge. Counsel for the Charging Party, Staughton Lynd, objected to Respondent's Exhibit 6(c) on this basis. Bishop, on examination by Lynd, replied in the negative to a broad question as to whether his ''duties or responsibilities'' were altered *after his title had changed to* ''*supervisor*.''[66] The Respondent therefore insisted that the document be received. Before ruling, I asked Bishop whether he had the authority reflected on the face of Respondent's Exhibit 6(c) *prior to Cullinan's discharge*. He said, ''No.'' In support of recusal, Shaffer charges that I sustained the Charging Party's objection to the offer of this document, after improperly questioning Bishop, in a fashion which permitted him to change his answer. The accusation is indicative. Considering what had already transpired on the record, a possibility existed that the witness might have been confused. Sensing this, it was within my authority to protect the record against any unintended response. As matters turned out, Bishop accurately responded to my question. Not one document of this kind completed by an LPN, prior to the Cullinan discharge, could be located in the Respondent's files. Not one of the Respondent's witnesses testified that, prior to the discharge, LPNs had issued or were authorized to issue disciplinary warnings. Moreover, Attorney Shaffer neglects to mention that Respondent's Exhibit 6(c) ultimately was received.

ITEM 13. Shaffer states that:

> Judge Harmatz also displayed his disdain for me on several occasions by berating my manner of preparation of Respondent's case. For example, after sustaining an objection to a question, Judge Harmatz, not the *objecting party*, explained the rationale for the *objection*.

At the core of this allegation is a question posed to his own witness, Helterbran:

> MR. SHAFFER: Until you got drawn into this litigation did it ever occur to you that anybody would seriously contend that the LPN was not a supervisor?
>
> A. No.

[63] When Helterbran identified the documents, I was under the misapprehension that she had authored them.

[64] This was registered just after Shaffer admitted that ''there is no doubt about it,'' the Respondent maintains an admissions department. Tr. 163–164.

[65] Contrary to Shaffer's representation, no evidence was offered that LPNs *ever* exercised discretion over whom and under what circumstances a patient would be admitted. In fact Cullinan's denial of such authority was confirmed by Helterbran's testimony that LPNs exercise no discretion as to such matters. In this light, it is inconceivable that Shaffer was unaware that Cullinan had testified accurately.

[66] In his affidavit Shaffer erroneously states that he had elicited this response from the witness.

MR. LYND: Objection.

JUDGE HARMATZ: Sustained.

MR. SHAFFER: On that basis, may I know the basis for the objection?

JUDGE HARMATZ: . . . . What her personal thoughts are and what she expected is not relevant to any issue in this proceeding.

Obviously, the appropriate inquiry was not the basis for the ''objection,'' but the basis for my ruling. The question put to the witness was fundamentally nonprobative, and its exclusion was routine.

This ruling and rationale is linked by Shaffer with an accusation that I had berated the manner in which he ''prepared the Respondent's case.'' In doing so, he claims that I made reference to ''foresight and hindsight in relation to litigation.'' Quotes are employed to convey that the language used was mine. Attorney Shaffer goes on to state that this language implies that I regarded his ''trial tactics . . . [as] . . . somehow questionable.'' In contrast with the allegation, the cited segment of the record does not substantiate that the quoted language was used by me or that words were used critical of counsel's trial tactics. (Tr. 320–321.)

ITEM 14. Shaffer avers that on another occasion, the writer objected to a question by Judge Harmatz put to a witness. Judge Harmatz refused to acknowledge it by stating: ''I don't want to hear your objection.'' The quote, though styled as complete, was not. The allegation pertains to my effort to clarify certain testimony by Helterbran concerning the duties of LPNs when a patient is discharged. What actually took place was as follows:

JUDGE HARMATZ: So . . . [the LPNs'] responsibility at that point, is custodial; prior to that point they're responsibilities are the same custodial responsibility that they always exercise while the patient was a resident, isn't that right?

MR. SHAFFER: I'm going to object to calling it custodial—

JUDGE HARMATZ: I don't want to hear your objection. I want an answer from the witness, okay.

THE WITNESS: They would continue in their position as duties of the nurse.

JUDGE HARMATZ: Right, right, that's what I meant.

The objection was heard, acknowledged, and implicitly overruled.

ITEM 15. Shaffer takes issue with my reference to his ''leading'' witnesses with ''prejudicial terminology.'' Here again, he states that ''it was hardly the place for the Judge to make it an issue if counsel has not.'' The record will attest to Shaffer's propensity to lead. Language is very important to the supervisory issue. The administrative law judge must assure that it is used with precision and accuracy, and under conditions likely to produce truth. Questions *loaded* with such prejudicial terminology as ''supervise,'' ''approve,'' ''authorize,'' and ''responsible'' create risks as to the reliability of the response, and burden the hearing, because of the frequent need for clarifying interrogation. (Tr. 365–367.) The regulation of this type of examination is not contingent on the actions of opposing counsel.

ITEM 19. Shaffer asserts that I exhibited disdain for the Respondent's case as evidence was elicited concerning LPN duties during an emergency. He points to my comments concerning Respondent's Exhibit 16, as indicating ''prejudgment'' that LPNs did not function with independent judgment when faced with an emergency. This document is self-explanatory. It lays out in detail on a step-by-step basis the procedures to be followed by LPNs in the event of fire or tornado. The document was offered by the Respondent and received. On its face, the document ''discouraged independent judgment'' in covered situations. The remark by me was founded on cold evidence.[67] (Tr. 324.) Finally, it is noted that although unmentioned in the affidavits, the Respondent at the hearing and in its posthearing brief makes the assertion that my comments at the hearing regarding this document were expressed without having read the document. The observation is without foundation. Moreover, it overlooks the obvious question as to just how I could have critiqued Respondent's Exhibit 16 so accurately without having read it.

ITEM 20. Shaffer's sworn statement includes the following:

> Judge Harmatz also displayed a preconception of facts that Respondent's LPNs were not supervisors later in the proceeding. After respondent Exhibit 18 was offered in evidence, Judge Harmatz asked if the opposing counsel had any objection. *After no valid objection was made, Judge Harmatz suggested that opposing counsel think further on the subject, as if to prompt them to articulate what the judge thought would be a valid objection*. [Emphasis added.]

The facts assumed in this representation, again, are not substantiated by the record. Thus, after verbally identifying each of the separate components of Respondent's Exhibits 18(a) through (nn), I attempted to clear the way for their admission, by addressing opposing counsel as follows:

JUDGE HARMATZ: . . . Now, I don't think there's any problem with the representation that these are ordinarily maintained as business records.

MS. BUTLER: Well, Your Honor, I would object to these on a few grounds.

JUDGE HARMATZ: Now, wait a minute. Let's not change the issue . . . .

Now the first issue is whether they're business records. Does anyone have any problem with that?

MS. BUTLER: Well, I would argue that the nursing home is in the operation of providing patient care. And business records would technically be the patients' files and the documents reflecting what has occurred with respect [to] the patients and not corrective action.

JUDGE HARMATZ: So, if somebody is manufacturing automobiles the only thing that would be business records would be the cost and material components that go into the automobile and not the personnel files?

MS. BUTLER: That—

JUDGE HARMATZ: No, I'm sorry. Personnel records—any kind of administrative records that are

[67] Montalto states that my ''smug comments'' concerning this document ''indicated [my] conclusions about the case'' and made it apparent that ''Judge Harmatz had already determined the outcome of the case.'' Here again, it is absolutely inconceivable that a trained attorney, speaking under oath, could in good faith hold to the notion that adverse comment as to a single document, itself limited to emergency situations, would radiate a conclusion as to the entire case.

> necessary and requisite to the operation of a business are business records.
>
> Think. Think about what helps you. Think about what hurts. [Tr. 334–336.]
>
> [Resumption of the Respondent's examination of Helterbran.]

Shaffer, in this instance, has transformed a rejection of the General Counsel's position (which, in turn, paved the way for receipt of his own proffer) into a sinister act prejudicial to the interest of his client.

In connection with this same exhibit, Shaffer argues that certain comments made by me ''left Respondent's witness believing the case was decided against Respondent and created the impression of some preconceived conclusions against the Respondent by the Judge.'' This is incomprehensible. The documents on their face show that LPNs who completed them were in fact ministering discipline. They were received.

The rub is that the earliest was dated August 9, 1991, after Cullinan's employment had ended. Helterbran could not recall whether this document had emerged before or after the Cullinan discharge. The Charging Party objected to Respondent's Exhibits 18(a) through (nn) on this ground. The following ensued:

> JUDGE HARMATZ: Well, I know the objection. I know the basis for the objection. I would like to know the earliest date. Does anybody remember the earliest—
>
> MR. LYND: I believe its August, Your Honor.
>
> JUDGE HARMATZ: Yes, I think it was August. That's my recollection, too, I mean before you suggested that.
>
> I will receive them and I would like—the reason I am going to receive them is not because I disagree with you, but because I think they have a bearing on the case in terms of certain subtleties that I'd rather not disclose at this time.

The ''subtleties'' pertained to the dates on these 40 documents and the fact that not one issued before the discharge. Shaffer, having inquired of Helterbran as to when the documents were generated, clearly grasped the relevance of the timing issue. It was left unexplained in the testimony of Helterbran. LPN Bishop had previously testified that the document in question emerged after the Cullinan discharge. As matters turned out, the Respondent was given the opportunity to demonstrate, on a posthearing submission, that these documents were in fact completed by LPNs prior to the discharge. It is difficult to imagine that the Respondent's counsel was unaware of what was going on, or that he, or anyone else could assume, that anything was said by me that suggested that ''the case was decided against Respondent.''

ITEMS 21, 22, 23, and 24. An act of neglect furnishes the basis for these allegations against me. When Shaffer offered Respondent's Exhibit 19, the General Counsel and Charging Party questioned an attachment being of dissimilar content and dated during a different time frame. Obviously the two documents were unrelated. Yet, instead of simply withdrawing the attachment, Shaffer sought an explanation from Helterbran, the authenticating witness. When I interceded, Helterbran acknowledged that the second document should not have been attached. Contrary to the allegations of Shaffer the witness was permitted to explain the discrepancy. However, there was no explanation other than her testimony that she would not have attached the second document, and the implication that it had been stapled together by someone other than herself.

In addition, Respondent's Exhibit 19 was described by Helterbran as ''an example of creative scheduling.'' I picked this up in chiding Shaffer that the attachment was ''an example of creative compiling of documents . . . . Just throw it in there.'' Beyond that he was importuned in no uncertain terms as to his responsibility for every document presented in evidence. He was also told that the oversight is:

> a bit critical to me since I have been burdened with a lot of documents that I don't think are particularly relevant. I've indicated to you that they weren't relevant. I don't think that a great deal of care went into these documents.

After I pointed out my expectation that ''every document . . . be carefully lathered before it is submitted in evidence,'' Shaffer implied that I had accused him of conduct that was ''unethical, immoral or dishonest.'' To this I replied, ''I don't consider negligence to be any of the things you described . . . .'' (Tr. 414.) Shaffer was repeatedly informed on the record that there was no accusation that documents had been fabricated.[68] (Tr. 409, 411, 414, 415.) Yet, in his affidavit, Shaffer persists that ''Judge Harmatz accused me of 'creative compiling of documents,' which was tantamount to a fabrication of evidence.''

Shaffer complains that I demeaned his professionalism when critical of the fact that there had been only a partial prehearing search for ''atta boys.'' In fact that search turned up 15 documents. (R. Exhs. 20(a) through (o).) Each was dated after the discharge. Earlier, counsel for the Respondent had submitted 40 ''corrective action'' forms. (R. Exhs. 18(a) through (nn).) Each was similarly flawed, being dated after the Cullinan discharge. It is inconceivable that the defense team was unaware prior to the hearing that, at least on their face, these documents were the most reliable and penetrating evidence available in the Respondent's arsenal to support the critical argument that LPNs were authorized to and did in fact engage in activity of a personnel nature, outside the realm of patient care. It should have been equally obvious that this evidence would have no utility if nonexistent during the relevant time frame.

Moreover, a subpoena was outstanding, and presumably the parameters of relevance in any search of personnel files would have been set by counsel. As events unfolded, counsel for the Respondent, prior to the hearing, would have known that each of these 55 documents was flawed by their execution after the discharge. For, documents in both categories had been marked in advance,[69] and hence had been in possession of the Respondent's attorneys prior to hearing. Yet, despite the potency of these documents, counsel apparently took no steps to broaden the prehearing search in the interest of discovering similar documents that might have been executed during the relevant time frame.

---

[68] There was not the remotest basis for suspecting that either was anything other than a legitimate, authentic, business record.

[69] Shaffer proclaims that this undertaking was discharged with great care.

To make matters worse, no other evidence was available to the Respondent to substantiate that this was the case. Helterbran, the only witness examined on the point, could not state that LPNs had executed these documents on any similar scale and while employed by the Respondent. The best she could do was suggest that the possibility that such documents existed. In doing so, she explained that there had been no prior examination of personnel files of terminated employees. I was confounded by the fact that counsel would have gone to hearing on this basis without soliciting the broadest possible search for these highly material documents. In light of Helterbran's explanation as to the abortive nature of the search, and the importance of any existing, timely ''atta boys'' and ''corrective action'' forms, in my judgment, the hearing could not be closed under those conditions. However, in order to avoid adjournment, leave was granted to permit the Respondent further opportunity to complete the record on a posthearing basis as to documents in both categories.

ATTORNEY MONTALTO. Before closing it is necessary to address a serious allegation in the affidavit signed by Montalto. In that document she avows that Helterbran had been ''the target of Judge Harmatz' comments,'' and at conclusion of her direct examination was ''quite distraught,'' and ''shed tears to relieve her tension.'' The gravity of this assertion is obvious. In material part, it relates to subjective matters, occurring behind the scenes, in an area where the truth would not have been witnessed by anyone other than those partisan to the Respondent. Beyond that, the attribution that my actions were the cause is outrageous and totally lacking in foundation. No elaboration is provided as to just what might have been said by me suggesting that Helterbran was targeted, or just what Helterbran might have been targeted for. Helterbran was questioned by me on direct but only to clarify her testimony[70] and documents,[71] or to narrow the scope of overly broad questions propounded by counsel for the Respondent,[72] or to curtail the latter's ponderous forays into irrelevant areas.[73] Any reader of the record will quickly observe that there was nothing implicit or explicit in this examination that would suggest disapproval of the witness, or that she was in any sense ''targeted.'' In fact, shortly before the close of direct, I engaged Helterbran in what appeared to be a good-humored exchange. At that time, there were no signs that she was distraught or on the verge of tears, and her responses on the record signaled that she was as content as one could be in her situation. See Tr. 421–422.

[70] Tr. 264, 276–277, 284, 290–291, 292, 347, 348, 349, 352–356, 386, 388–389, and 392.

[71] Tr. 303–304, 310, 315–316, 397, 399–400, 405, and 407–408.

[72] Tr. 418–419.

[73] Tr. 281, 360–364, 365–366, 367–368, 370–371, and 372.